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ABSTRACT

This report focuses on a 1998 community forum that examined the impact of the 1993 Apology Resolution enacted to recognize the 1893 overthrow of the Hawaiian monarchy, subsequent meetings in 2000 with Na Kupuna (Hawaiian elders), and a 2000 community forum to collect information on concerns of Native Hawaiians and others regarding the impact of the U.S. Supreme Court decision in Rice v. Cayetano on Native Hawaiians. Seven sections include: "Introduction and Background" (social cohesion and conflict; cultural identity); "The Past That Haunts: A History of Hawaiian Annexation" (political and cultural transformation; international domination and overthrow); "Hawai'i Today: Diversity and Disparity" (Hawaiian ethnicity, demographics, and socioeconomics); "The Path to Reconciliation and Reparation" (legislative attempts and determining the parameters of reconciliation); "Reconciliation at a Crossroads: Implications of the Rice Decision" (the Native Hawaiian vote and public comment on the Supreme Court's decision); "Recognition Legislation before Congress: A Safe Harbor?"; and "Conclusions and Recommendations" (the federal government should accelerate efforts to formalize political relationships between Native Hawaiians and the United States, and state and federal funding to improve the conditions of Native Hawaiians should be increased). A list of forum panelists is appended. (SM)

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Hawaii Advisory Committee to the U.S. Commission on Civil Rights

Reconciliation at a Crossroads:

The Implications of the Apology Resolution and *Rice v. Cayetano* for Federal and State Programs Benefiting Native Hawaiians

Summary Report of the August 1998
and September 2000 Community Forums
in Honolulu, Hawai'i

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June 2001

A fact-finding report of the Hawaii Advisory Committee to the U.S. Commission on Civil Rights prepared for the information and consideration of the Commission. Statements and recommendations in this report should not be attributed to the Commission, but only to participants at the community forums or to the Advisory Committee.

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Hawaii Advisory Committee to the U.S. Commission on Civil Rights

Reconciliation at a Crossroads:

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Summary Report of the August 1998
and September 2000 Community Forums
in Honolulu, Hawai'i

Letter of Transmittal

Hawaii Advisory Committee to
the U.S. Commission on Civil Rights

Members of the Commission
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Cruz Reynoso, *Vice Chairperson*
Christopher Edley, Jr.
Yvonne Y. Lee
Elsie Meeks
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Victoria Wilson

Les Jin, *Staff Director*

Attached is a report from the Hawaii Advisory Committee based upon a community forum held August 22, 1998, to collect information on the impact of the 1993 Apology Resolution enacted to recognize the 1893 overthrow of the Hawaiian monarchy, and subsequent meetings with Nā Kūpuna held September 28, 2000, and a community forum convened September 29, 2000, to collect information on concerns of Native Hawaiians and others on the impact of the U.S. Supreme Court decision in *Rice v. Cayetano* on Native Hawaiians. All meetings were held in Honolulu, the capital of Hawai'i. Commission Vice Chairperson Cruz Reynoso and Commission members Yvonne Y. Lee and Elsie Meeks joined the Hawaii Advisory Committee in the September 2000 effort.

The issue of Native Hawaiian sovereignty and the impact of the 1893 overthrow is complex. The passage of over 100 years and the migration of various peoples to the territory and later, the island state of Hawai'i, has compounded the impact. What was clear from the 1998 presentations was the need for continued dialogue and a concerted effort by Native Hawaiians to outline the essential parameters of reconciliation. While this dialogue was taking place, *Rice v. Cayetano* was working its way through the federal court system and eventually found its way to the U.S. Supreme Court.

The U.S. Supreme Court ruled in *Rice v. Cayetano* that a voting procedure allowing only Native Hawaiians to vote for members of the Office of Hawaiian Affairs violated the 15th Amendment of the Constitution, which prohibits race-based exclusion from voting. While the decision was lauded by some, Native Hawaiians complained that it overlooked the historical facts of what the Apology Resolution acknowledged as the illegal overthrow of their constitutional monarchy over a hundred years ago. The *Rice* decision has occurred during a flourishing movement for self-determination and self-governance, fueling feelings of anger and frustration within the Native Hawaiian community.

At its meeting of March 30, 2000, the Hawaii Advisory Committee determined it should conduct an open meeting on the impact of the *Rice* decision. Because of questions regarding equal protection and the constitutionality of purported "race-based entitlement programs" evoked by the *Rice* decision, the Hawaii Advisory Committee further determined that it should request involvement of the U.S. Commission on Civil Rights. The Commission decided that it would assist the Advisory Committee in obtaining information at an open session through the participation of members of the Commission.

Many participants at the open meeting voiced their opinion that the decision negates attempts to remedy past inequities and impinges efforts to assist Native Hawaiians in such areas as education, employment, and health care. Others suggested that the decision affirms constitutional guarantees for equality.

The Advisory Committee appreciates the support of Vice Chairperson Cruz Reynoso and Commissioners Yvonne Y. Lee and Elsie Meeks, who participated in this forum, and the voluntary contribution of the people of Hawai'i, both native and non-native, who appeared before the Advisory Committee panel.

The Advisory Committee approved submission of this report to the Commission without objection. It is hoped that the report will add to the dialogue for constructive change and an equitable solution.

Respectfully,

Charles Maxwell, Sr., *Chairperson*
Hawaii Advisory Committee

Hawaii Advisory Committee to the U.S. Commission on Civil Rights

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Preface

Advisory Committee Involvement in the Hawaiian Civil Rights Movement

In 1979, the Hawaii Advisory Committee to the U.S. Commission on Civil Rights received complaints from concerned citizens and trust beneficiaries regarding administration, management, and enforcement of the homelands trust established under the Hawaiian Homes Commission Act (HHCA).[1] The Hawaii Advisory Committee convened a public forum and subsequently released a report in 1980 titled *Breach of Trust? Native Hawaiian Homelands.* In 1988, the Hawaii Advisory Committee convened a fact-finding meeting to solicit information on intervening developments with respect to the implementation, management, and enforcement of the HHCA. The Hawaii Advisory Committee then convened a second fact-finding meeting in 1990, followed by release of its report in 1991 titled *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians.*

The Hawaii Advisory Committee recognizes that the failure to faithfully administer the HHCA constitutes systematic and pervasive discrimination against Native Hawaiians by both the federal and state governments, despite explicit and implicit trust duties owed to Native Hawaiian beneficiaries. This recognition implicates complex issues that distinguish the Hawaiian self-determination issue from virtually all other civil rights inquiries. The Commission's State Advisory Committees do not typically focus on allegations of discrimination that involve the right of self-determination. However, given the political status accorded to more than 550 tribes, confederations, and bands currently recognized by the U.S. government, the lack of federal recognition for Native Hawaiians appears to constitute a clear case of discrimination among the native peoples found within the borders of this nation. It is from that perspective that the Hawaii Advisory Committee conducted its inquiries on reconciliation efforts and the *Rice v. Cayetano* decision. The Hawaii Advisory Committee fully recognizes that this issue overlaps considerably with issues related to the implementation of its recommendations in the 1991 *Broken Trust* report. For example, recommendation 2 of the committee's 1991 report called upon Congress to enact appropriate legislation to recognize a trust relationship between the United States and Native Hawaiians.[2]

In 1993, Congress passed a joint resolution and President Clinton subsequently signed Public Law 103-150, which acknowledged the 100th year commemoration of the overthrow of the Kingdom of Hawaii. Public Law 103-150 also apologized to Native Hawaiians for the improper role the United States Navy played in support of the overthrow. The measure committed the United States to acknowledging the ramifications of the "illegal overthrow" in 1893, in order to support a foundation for and to support reconciliation between the United States and the Native Hawaiian people. Finally, Public Law 103-150 called upon the President to engage in a policy of reconciliation with Hawaiians.

Five years passed without any apparent action to implement the federal policy of reconciliation with the Native Hawaiian people. Based upon concerns voiced in the community that ongoing delays in reconciliation efforts posed a serious risk to the well-being of Native Hawaiians and to the enforcement of their civil rights, the Hawaii Advisory Committee held a daylong community forum on August 22, 1998. The forum consisted of five panels of experts, including scholars, attorneys, government officials, service providers, and local activists. Each panel focused on one of five topics related to the Apology Resolution: (1) its purpose and meanings; (2) civil rights implications; (3) equal protection for Native Hawaiians; (4) state reconciliation efforts and future initiatives; and (5) federal oversight, reconciliation efforts, and future initiatives.[3] The Hawaii Advisory Committee strove to invite a cross-section of participants to obtain a balanced view of the issues, analysis, and information relevant to its inquiries. Thus, opposing viewpoints were shared with the Hawaii Advisory Committee in a session open to the public and media. Because of time and budget constraints, however, the Hawaii Advisory Committee simply could not accommodate everyone who wished to participate on scheduled panels. Others, including members of the State Senate and House of Representatives, chose not to accept invitations extended by the Hawaii Advisory Committee.

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[1] Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921) (sometimes referred to as the Hawaiian Homes Commission Act of 1920, because the underlying bill was introduced the year prior to its passage), *reprinted in* 1 HAW. REV. STAT. 191–233 (1993); 1 HAW. REV. STAT. 51, 57–66 (Supp. 2000). *See also* 48 U.S.C. § 691 note (1987).

[2] Hawaii Advisory Committee, *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, 1991, p. 44.

The Hawaii Advisory Committee tried to hold hearings on each of the seven populated islands of Hawai'i. However, the Advisory Committee was forced by time and budget constraints to limit its inquiry to one meeting on O'ahu, the population center of these islands, where 80 percent of Hawaii's citizens currently reside. Beyond the invited guests, the Advisory Committee allowed an extra two hours for any member of the public to appear and speak. Nineteen members of the public provided testimony at the conclusion of the scheduled panels.[4] All those who participated in the community forum, and members of the general public, were invited to submit additional written testimony through the Western Regional Office of the U.S. Commission on Civil Rights.

Several themes emerged from the testimony presented to the Hawaii Advisory Committee, some of which will be discussed in greater detail later in this report. The themes include:

- historical, ongoing claims for justice
- the shifting political winds that characterize the relationship between Native Hawaiians and the United States
- the perception that promises are typically followed by inaction or lack of commitment
- growing frustration among Native Hawaiians
- the need for dialogue, in Hawai'i, and on a continuing basis, between the United States and Native Hawaiians

Shortly after the Hawaii Advisory Committee's August 1998 forum, the U.S. Department of the Interior and Department of Justice announced plans to conduct statewide hearings on reconciliation. In late 1999, representatives from the Departments of the Interior and Justice arrived in Hawai'i and conducted a series of public hearings, culminating December 11, 1999, on the island of O'ahu. Persons who attended these hearings were informed that a report would be produced within a few months. However, the report was delayed in order to take into consideration legal developments that are more fully described later in this report. The Departments of the Interior and Justice ultimately issued their Reconciliation Report on October 23, 2000.

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[3] Panelists on August 22 included: Esther Kia'aina, legislative assistant, U.S. Senator Daniel K. Akaka; Rev. Kaleo Patterson, associate pastor, Kaumakapili Church, and executive director, Hawaii Ecumenical Coalition; James Mee, attorney; Carl Christensen, attorney, Native Hawaiian Legal Corporation; Pōkā Laenui, Institute for the Advancement of Hawaiian Affairs; John Goemans, attorney (by telephone); Kanalu Young, professor, Center for Hawaiian Studies, University of Hawai'i at Mānoa; Jon M. Van Dyke, professor, William S. Richardson School of Law, University of Hawai'i at Mānoa; Stuart Minor Benjamin, professor, University of San Diego Law School (by telephone); Mililani Trask, Kia'āina (governor), Ka Lāhui Hawai'i; A. Frenchy DeSoto, chairperson, Office of Hawaiian Affairs; Kali Watson, chairperson, Hawaiian Homes Commission, and director, Department of Hawaiian Home Lands; Peter Apo, special assistant for Hawaiian affairs, Office of the Governor of Hawai'i; Ferdinand "Danny" Aranza, deputy director, Office of Insular Affairs, U.S. Department of the Interior; Mark Van Norman, deputy director, Office of Tribal Justice, U.S. Department of Justice; and Grover Joseph Rees, staff director and chief counsel, Subcommittee on International Operations and Human Rights, Committee on International Relations, U.S. House of Representatives.

[4] Open session participants were: Kina'u Boyd Kamali'i; Mililani Trask; Stephanie Bengene Lindsey; Richard Schrantz; Richard Thompson; Charles Rose; Lilikalā Kame'eleihiwa; Richard Morse; Lela Hubbard; Luis Hangca Jr.; Louis Agard; William Ko'omealani Amona; Jimmy Wong; Pomai Kai Lokelani Kinney (Henry Richard Kinney Jr.); Lehua Kinilau; Bernard Freitas; Maui Loa; Coochie Kayan-Coons; and Owana Salazar.

A little more than a year before the Departments of the Interior and Justice released their Reconciliation Report, the U.S. Supreme Court heard oral arguments in *Rice v. Cayetano*. The case presented the issue of whether the State of Hawai'i could limit the election of trustees to the Office of Hawaiian Affairs (OHA) to Native Hawaiians, who were the intended beneficiaries of OHA. Both the District Court for the District of Hawai'i and the United States Court of Appeals for the Ninth Circuit held that the OHA elections did not violate either the 14th or 15th Amendments of the United States Constitution.[5] However, on February 23, 2000, the U.S. Supreme Court vacated the lower court decisions, concluding instead that the OHA elections violated the 15th Amendment.[6]

These circumstances prompted the Hawaii Advisory Committee to request, at its March 30, 2000, meeting, that the U.S. Commission on Civil Rights come to Hawai'i and join an open meeting on the potential impact of the decision. The Commission determined that the project should remain an Advisory Committee activity and that a number of Commissioners would join in collecting the information.[7] The Advisory Committee held another community forum on September 29, 2000, in Honolulu, Hawai'i. Commission Vice Chairperson Cruz Reynoso and Commissioners Yvonne Y. Lee and Elsie Meeks sat as members of the hearing panel. The intent of the forum was to give voice to the concerns of Hawaiians and non-Hawaiians relating to the potential immediate and long-term implications of the *Rice* decision on federal and state programs for Native Hawaiians and possible future remedies, as suggested by proposed legislation.[8] The forum consisted of five panels of experts, including scholars, attorneys, government officials, service providers, and local activists. Each panel focused on one of five topics related to the Supreme Court's decision in *Rice v. Cayetano*: (1) the impact on programs in health, education, and housing; (2) legal implications; (3) government programs; (4) legislative response; and (5) other perspectives.[9]

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[5] Rice v. Cayetano, 963 F. Supp. 1547 (D. Haw. 1997), *aff'd*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 120 S. Ct. 1044 (2000). On remand from the Supreme Court, the court of appeals vacated its earlier decision, reversed the district court, and remanded the case for further proceedings. Rice v. Cayetano, 208 F.3d 1102 (9th Cir. 2000). The district court subsequently entered judgment, consistent with a stipulation by the parties, declaring that the plaintiff's 15th Amendment rights were violated. *See* Rice v. Cayetano, Civ. No. 96-00390-DAE (D. Haw. Apr. 11, 2000) (Order Approving Stipulation of Plaintiff and Defendant, Entering Final Judgment and Dismissing Office of Hawaiian Affairs, Rowena Akana, Haunani Apoliona, Donald Cataluna, A. Frenchy DeSoto, Louis Hao, Clayton Hee, Collette Machado, Hannah Springer, and Mililani Trask, in their Capacity as Trustees of the Office of Hawaiian Affairs Motion to Intervene as Moot).

[6] Rice v. Cayetano, 120 S. Ct. 1044 (2000).

[7] The Western Regional Office of the U.S. Commission on Civil Rights interviewed potential panelists suggested by the Advisory Committee and members of the Commission, selected the site of the meeting, and handled publicity efforts. Although the Advisory Committee proposed multiple sessions to accommodate those who live on the neighbor islands or, in the alternative, utilization of the Hawaii Interactive Telecommunications System, these requests reportedly could not be accommodated.

[8] Recognition Legislation, S. 2899, 106th Cong., 2d Sess. (2000). *See also* Recognition Legislation, S. 81, 107th Cong., 1st Sess. (2001); Recognition Legislation, S. 746, 107th Cong., 1st Sess. (2001).

[9] Panelists on September 29 included: Dr. Richard Kekuni Akana Blaisdell, professor of medicine, University of Hawai'i at Mānoa; Dr. Peter Hanohano, executive director, Native Hawaiian Education Council; Dr. Lilikalā Kame'eleihiwa, director, Center for Hawaiian Studies, University of Hawai'i at Mānoa; Tara Lulani Mckenzie, president and chief executive officer, Alu Like, Inc.; Dr. Kenneth Conklin, retired university professor and former high school mathematics teacher; Mahealani Kamau'u, executive director, Native Hawaiian Legal Corporation; Bill Hoshijo, executive director, Hawai'i Civil Rights Commission; Robert Klein, attorney and former state supreme court justice; H. William Burgess, retired attorney; Edward King, professor of law, University of Hawai'i at Mānoa and former chief justice for the Federated States of Micronesia; Clayton Hee, chairman, board of trustees, Office of Hawaiian Affairs; Sherri Broder, legal counsel, Office of Hawaiian Affairs; Ray Soon, chairman, Hawaiian Homes Commission and director, state Department of Hawaiian Home Lands; Mike Kitamura, Office of U.S. Senator Daniel Akaka; Sol Kaho'ohalahala, representative, Hawai'i State Legislature; Jon M. Van Dyke, professor of law,

The session concluded with a forum open to the public, at which approximately 19 individuals representing a range of perspectives testified.[10] Hawaiian elders, or kūpuna, spoke the evening prior to the forum, following a meeting of the Hawaii Advisory Committee. Approximately 14 kūpuna gave testimony.[11] Again, all those who participated in the community forum, and members of the general public, were invited to submit additional written testimony through the Western Regional Office of the U.S. Commission on Civil Rights. Several themes emerged from the testimony presented to the Hawaii Advisory Committee, some of which will be discussed in greater detail below. The themes included:

- the effect of history on the current status of Native Hawaiians and their rights
- the constitutional rights and civil rights of indigenous peoples, including the right to self-determination
- the constitutionality of federal and state programs for Native Hawaiians
- the significant benefits of programs for the betterment of the conditions of Native Hawaiians
- the relationship between Native Hawaiians and other indigenous groups
- self-governance and political recognition

The intent of this report is to highlight major themes of the 1998 and 2000 proceedings, document the debate surrounding the reconciliation process and entitlement programs, and provide recommendations designed to ensure the preservation of civil rights for Native Hawaiians.

University of Hawai'i at Mānoa; Sondra Field-Grace, secretary and treasurer, Ili Noho Kai O Anahola; David K. Helela, U.S. Army, retired; Kanoelani Medeiros, self-proclaimed Hawai'i Nationalist; and Patrick Hanifin, attorney.

[10] Open session participants were: Emmett Lee Loy, native Hawaiian attorney; William Kalawaianui; Steve Tataii; Richard Bertini, executive director, Wai'anae Comprehensive Health Center; James K. Manaku Sr.; Rodney Shim; Max Medeiros, Hawaiian subject; Michael Grace; Mohala Haunani, Kimokeo Keawe 'Ohana; William Lawson; Mililani Trask, Native Hawaiian attorney; Christopher Haig, Heritage Research Productions; Lucy Akau; Jill Nunokawa, civil rights counsel, University of Hawai'i at Mānoa; Alice Greenwood; Nancy Stone, non-Hawaiian candidate for OHA; Williamson Chang, professor, William S. Richardson School of Law, University of Hawai'i at Mānoa; and A'o Pohaku Rodenhurst, Spiritual Nation of Kū and Council of Sovereigns.

The Hawaii Advisory Committee requested inclusion of the transcripts from the 1998 and 2000 community forums, in addition to all written submissions, as appendices to this report. Consistent with Commission practices, these documents, although not appended, are on file with the Western Regional Office to the U.S. Commission on Civil Rights.

[11] Self-identified kūpuna who appeared before the Hawaii Advisory Committee were: Eloise Ululani Tungpalan, retired state senator, State of Hawai'i; Virginia Kepau; Virginia Halemano Kalua; Violet Hughes; Moanikeala Akaka, former OHA trustee; Sondra Field Grace; Ishmail Stagner; Dorothy Lam; Dawn Wasson; Soli Niheu; Anna Marie Kahunahana; Kina'u Boyd Kamali'i; Lela Hubbard; and Harold H. Meheula Sr., president, the Hawai'i(an) Nation-Fishermen's Association of the Hawaiian Archipelago. An audiotape of the Sept. 28, 2000, proceeding is available through the Western Regional Office of the U.S. Commission on Civil Rights. It was not transcribed in time for inclusion as an appendix to this report.

Reconciliation at a Crossroads: The Implications of the Apology Resolution and *Rice v. Cayetano* for Federal and State Programs Benefiting Native Hawaiians

Summary Report of the August 1998 and September 2000 Community Forums in Honolulu, Hawai‘i

INTRODUCTION AND BACKGROUND

Social Cohesion and Conflict

Hawai‘i has been called a "laboratory of race relations" based on its carefully cultivated image as a place where people of different cultures have historically lived together and "fused."[1] This image has a certain amount of validity when Hawaii's racial "fusion" is contrasted to that found in most of the continental United States. For Native Hawaiians,[2] the fusion has been forced at times and cultural domination is a reality etched in daily existence. In 1933, one scholar observed:

> Hawai‘i offers opportunity to the people of all races on terms that approach uncommonly close to equality. Responding to opportunity, the peoples are entering upon a larger social inheritance, and one may look forward to an enrichment of this heritage through the achievement of men and women of all races.[3]

This observation is in sharp contrast to the conclusion reached nearly 70 years later after a series of public dialogues on race and culture in Hawai‘i:

> In our community there is more pain than we admit and more than we tend to show the outside world. Hawaiians mourn the loss of their culture and their land. New immigrants—Filipinos, Samoans, Southeast Asians, African-Americans—suffer daily indignities. The Japanese remember the bitterness of their plantation days and their internment on the West Coast. Haoles speak of being held accountable and demonized for events not of their making such as the 1893 overthrow.[4]

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[1] Andrew W. Lind, *Hawaii's People* (Honolulu, HI: University of Hawaii Press, 1974), p. 85.

[2] Beginning in the mid-1970s, the U.S. Congress defined the term "Native Hawaiian" (capital "N") to include all persons who are descended from the people who were in the Hawaiian islands as of 1778, when Captain James Cook discovered the islands for the Western world. *Compare* Native American Programs Act of 1974, Pub. L. No. 93-644, § 801, 88 Stat. 2291, 2324 (1975), *with* Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-569, tit. V, subtitle B, § 513, 114 Stat. 2944 (2000) (amending tit. VIII, § 801(9)(B)). Previously, Congress used the term "native Hawaiian" (lower case "n") with regard to persons having 50 percent or more Hawaiian blood. *See* Hawaiian Homes Commission Act, Pub. L. No. 67-34, ch. 42, § 201(a)(7), 42 Stat. 108 (1921); *id.* § 209, *as amended* (subsequently modified to 25 percent for heirs). Except where otherwise indicated, the Hawaii Advisory Committee intends the broader application of the term. Use of this terminology should not be construed as an attempt to either define or limit the scope of those persons whose rights are the subject of this report.

The Hawaii Advisory Committee is also aware that many Native Hawaiians prefer to identify themselves as their ancestors once did, i.e., Kānaka Maoli. *See* text accompanying footnotes 57 and 67 below (Richard Kekuni Blaisdell statement). Other Native Hawaiians contest the validity of this term. Although use of the term Kānaka Maoli is becoming more widespread, many of the documents discussed in this report and statements provided by members of the public use the term Native Hawaiian instead. Considering the complexity of the issues involved, the Hawaii Advisory Committee has decided to follow common usage in order to avoid potential confusion.

[3] Lind, *Hawaii's People*, p. 85 (citing Romanzo Adams, *The Peoples of Hawaii* (Honolulu, HI: The Institute of Public Relations, 1933)).

[4] Peter Adler, Michael Broderick, Momi Cazimero, Linda Colburn, Mitch D'Olier, Delores Foley, Miki Lee, and Marina Piscolish, "A Place at the Table," *The Honolulu Advertiser*, Nov. 19, 2000, p. B1. Haole means "[w]hite person, American, Englishman, Caucasian . . . formerly, any foreigner. . . ." Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary* (Honolulu, HI: University of Hawai‘i Press, 1986), p. 58.

Neither observation negates the fact that Hawaii's first people welcomed with considerable aloha those who were once outsiders. It is both ironic and tragic that most Native Hawaiians have become increasingly marginalized and culturally dominated in their own land. The domination and suppression, most Native Hawaiians believe, have had a devastating effect on their culture. Although the root cultures of Hawaii's immigrants continue in their lands of origin, this is the only homeland for the indigenous people of these islands.

Hawai'i is now in a state of social conflict between preserving the status quo, returning to historical roots, and pushing the civil rights of indigenous people forward to a new level. As the movement for change in Hawai'i has gained momentum, several factions have emerged representing the broad spectrum of interests. They include those who desire nation-within-a-nation recognition, a status similar to that of American Indians and Alaska Natives; those who desire secession from the United States and independent nationhood status; and those who desire the abolishment of any Native Hawaiian entitlement programs. The basic divisive force at work is disagreement about what the relationship between the United States and Native Hawaiians is and should be.

The history of the United States' wrongdoing and subsequent failure to assist Native Hawaiians is well documented and widely acknowledged. For more than a century, the U.S. relationship with Hawai'i has been the subject of inquiry by historians, legal scholars, and civil rights advocates. Because of the unique history of the state's annexation, the legal issues are complex. Ever since the overthrow and annexation of their nation, Native Hawaiians have been engaged in the struggle to regain their culture and lands and, for some, to restore their sovereign nation status.[5]

Attempts to remedy the effects of past government actions have been the subject of ongoing political and judicial scrutiny, leading to the issuance of the 1993 Apology Resolution[6] and, more recently, the U.S. Supreme Court decision in *Rice v. Cayetano*.[7] While the former appeared to be a positive step in the reconciliation process in its acknowledgment of the United States' wrongdoing, the latter has once again fueled the debate about race, ideology, and Hawaiian nationalism. In a split decision, the Supreme Court decided that a voting procedure whereby only Native Hawaiians could vote for members of the Office of Hawaiian Affairs violated the 15th Amendment of the Constitution, which prohibits race-based exclusion from voting.[8] The *Rice* decision has occurred against the backdrop of a burgeoning movement for self-determination, fueling the feelings of anger and frustration within the Native Hawaiian community. The Court's decision has brought to the forefront the legal distinctions between equal protection and race-based favoritism and has called into question the status of Native Hawaiians. Indeed, the very definition of who is Hawaiian has become more intangible.

The plight of Native Hawaiians raises important and difficult questions about the concepts of civil rights and self-determination in the United States. Despite the legal and political discussions, a very human element lies at the core of the debate as Native Hawaiians struggle for the preservation of identity and culture.

Cultural Identity

Native Hawaiian identity is derived from the Kumulipo, or Creation Chant, which teaches that Native Hawaiians are genealogically related to the Hawaiian islands.[9] Dr. Lilikalā

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[5] Jon M. Van Dyke, "The Political Status of the Native Hawaiian People," *Yale Law and Policy Review*, vol. 17 (1998), p. 97.

[6] Joint Resolution of Congress to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians, S.J. Res. 19, 103d Cong., 1st Sess., Pub. Law No. 103-150, 107 Stat. 1510 (1993) (hereafter cited as Apology Resolution). The Apology Resolution is a statute of the U.S. Congress, passed by the Senate on Oct. 27, 1993, the House on Nov. 15, 1993, and signed by President William Jefferson Clinton on Nov. 23, 1993. It has the same effect as any other law enacted by Congress. *See, e.g.*, Van Dyke, "The Political Status of the Native Hawaiian People," p. 107, n.69.

[7] 120 S. Ct. 1044 (2000).

[8] *See* pp. 25–42 for a detailed discussion of the *Rice* case.

[9] Dr. Lilikalā Kame'eleihiwa, statement before the Hawaii Advisory Committee to the U.S. Commission on Civil Rights, "The Impact of the Decision in *Rice v. Cayetano* on Entitlements," community forum, Honolulu, HI, Sept. 29, 2000, transcript, pp. 29–32 (hereafter cited as Forum 2000 Transcript). *See also* Dr. Lilikalā Kame'eleihiwa, *Native Lands and Foreign Desires: Pehea Lā E Pono Ai?* (Honolulu, HI: Bishop Museum Press, 1992), pp. 2, 23.

Kame'eleihiwa,[10] director of the Center for Hawaiian Studies, University of Hawai'i at Mānoa, provided the following succinct history of the Native Hawaiian people:

> From time immemorial, Native Hawaiians have had a special genealogical relationship to the Hawaiian islands. Born from the mating of Earth Mother Papa and Sky Father Wākea, we're the Hawaiian islands and the Hawaiian people. That's the definition of native. We are from the land 100 generations ago. As such we have an ancient duty to love, cherish, and cultivate our beloved grandmother, the land. The study of stewardship is called mālama 'āina, where land is not for buying and selling, but for the privilege of living upon. And in the reciprocal relationship, when we Native Hawaiians care for and cultivate the land, she feeds and protects us. . . .
>
> Even after the Native Hawaiians were converted to Christianity and countless notions of capitalism, which required pride of ownership of land, the King insisted upon the right of native tenants. The rights of native tenants include the right to enter into and live upon any unoccupied land. Since land was an important source of food, denial to land was tantamount to starvation and death.
>
> And, as you know, crown lands and government lands, once taken over by America, became lands that America controlled and denied Native Hawaiians the right to live upon. . . .
>
> [M]any Hawaiians have tried to move onto those lands to provide housing for their people, for their children, . . . those people have been arrested, evicted, their houses and possessions bulldozed. You're going to hear from people today who will say those things who have been there and through that.
>
> A majority of the homeless in Hawaii are Hawaiians, Native Hawaiians. We have thousands of children every day who are Native Hawaiian going to school from situations of homelessness, from tents, from cars, from caves. This is a terrible thing that has been done to our people. It is a great wrong by America.[11]

According to the Kumulipo, the main staple of the Native Hawaiian diet is kalo (or taro), their elder brother.[12] The genealogical sequence also includes creatures of the sea and land.[13] Commoners and chiefs alike were "descended from the same ancestors, Wākea and Papa."[14] Native Hawaiians are also linked to Polynesians who sailed their double-hulled canoes to the Hawaiian archipelago, navigating by ocean currents, winds, and the stars.[15] Before Wākea and Papa, there existed approximately 800 generations of Polynesians.[16]

For centuries, the primary social unit for Native Hawaiians was the 'ohana, or extended family. A system of reciprocal obligation and support later developed between the chiefs and the people in response to the needs encountered by an expanding population. At the time of European contact, the Native Hawaiian people "lived in a highly organized, self-sufficient, subsistent society based on a system of communal land tenure with a highly sophisticated language, religion, and culture."[17]

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[10] The Hawaii Advisory Committee uses diacritical markings, where appropriate, in keeping with 'Ōlelo Hawai'i, i.e., the Hawaiian language. Vowels marked with a kahakō, or macron, are somewhat longer than other vowels and are always stressed. The 'okina, or glottal stop, is similar to the sound between the oh's in English oh-oh. The Hawai'i Supreme Court began using these diacritical markings on Hawaiian words during the 1990s as reflected in the Court's published decisions. On Oct. 22, 2000, the *Honolulu Advertiser* announced its permanent commitment to the practice, except where it is known that a particular individual, company, or organization does not wish to use the kahakō or 'okina in its name. *See* <http://the.Honoluluadvertiser.com/2000/Oct/22/1022localnews14.html>. Hawaiian is one of the official languages of the State of Hawai'i. HAW. CONST. art. XIV, § 4.

Members of the Hawaii Advisory Committee requested that certified shorthand recorders familiar with the Hawaiian language be retained to document the proceedings during its community forums. For unexplained reasons, this request was not honored. Therefore, this report fails in some important respects to accurately reflect the testimony provided during the forums. As a result, the proceeding transcripts sometimes merely indicate "(speaking Hawaiian)" and even "(inaudible)" where substantive testimony was provided in 'Ōlelo Hawai'i. Despite efforts to correct misspellings of Hawaiian words and phrases, additional errors may not have been detected.

[11] Kame'eleihiwa statement, Forum 2000 Transcript, pp. 29–32.

[12] Kame'eleihiwa, *Native Lands and Foreign Desires*, p. 24.

[13] Ibid., p. 2.

[14] Ibid., p. 19 (quoting David Malo, a Native Hawaiian scholar in the 1840s).

[15] According to Kahu (Reverend) Charles Kauluwehi Maxwell, chairperson of the Hawaii Advisory Committee, the opening chant, or 'oli, recounted this fact as an excerpt from the Kumulipo. Regrettably, the 'oli was not recorded in the transcript of this meeting.

[16] Ibid.; *see also* M.W. Beckwith, *Hawaiian Mythology* (Honolulu, HI: University of Hawai'i Press, 1972), p. 311 (mentioning "over a thousand lines of genealogical pairs").

The Past that Haunts: A History of Hawaiian Annexation

> *Hawaii is ours. As I look back upon the first steps in this miserable business, and as I contemplate the means used to complete the outrage, I am ashamed of the whole affair.*[18]
>
> — President Grover Cleveland

To fully understand the implications of the reconciliation process, the Supreme Court's decision in *Rice v. Cayetano*, and the subsequent legal, political, and social fallout, it is necessary to appreciate the historical context in which Native Hawaiians are situated. The history of Hawaii's overthrow, annexation, and eventual statehood, in some ways, parallels how other native inhabitants of now-American lands have been treated. However, while the U.S. government has a history of dissolving and displacing many indigenous peoples, such as American Indians and other Native Americans, the case in Hawai'i is somewhat unique. The details of Hawaii's history are often disputed.

There are some who continue to believe that Hawai'i was not "stolen," but rather that the people made a conscientious decision to become a part of the United States and to adopt the religious and cultural beliefs of Western settlers. William Burgess, retired attorney, stated during the 2000 forum:

> [T]he fact is, historically, there is simply no justification for the argument that the lands of Hawai'i were stolen by the United States. The lands of Hawai'i under the kingdom were held for the benefit of all the subjects of the kingdom, not just for those of Hawaiian ancestry.[19]

However, by the U.S. government's own admission, the accepted account of Hawaii's journey to statehood reveals the unlawful violation of a trust between nations and the forced cultural domination of Hawaiians.

Political and Cultural Transformation

In 1778–1779, there were between 400,000 and 1 million Native Hawaiians living in the islands.[20] At that time, control over the islands was divided among four high chiefs.[21] Later, in 1810, a unified monarchy of the Hawaiian islands was established under the rule of Kamehameha I, the first king of Hawai'i. During the 1800s, the Kingdom of Hawaii was recognized as a sovereign and independent nation. The Hawaiian nation entered into treaties with more than 15 other nations, including the United States.[22] From 1826 to 1893, the United States extended full diplomatic recognition to the kingdom and entered into various treaties and conventions involving commerce and navigation. Despite this recognition, or perhaps because of it, there were proactive attempts to colonize the people of Hawai'i, if not through government actions, through social and religious intervention. Between 1820 and 1850, more than 100 missionaries from the Congregational Church were sent to the Kingdom of Hawaii.[23]

During that same period, the Kingdom of Hawaii underwent many changes to its culture, population, economy, religion, health practices, and land tenure system that would alter Hawaiian culture permanently. Eventually, pressures from Americans and Europeans influenced the privatization of the land and the dissolution of complete monarchy. In 1848, the land was divided among the main chiefs (1.5 million acres), King Kamehameha III (1 million acres), and the government (1.5 million acres). All lands were granted subject to the rights of tenants, as was the case in the traditional land tenure system.[24] Despite this, many Hawaiians were never given the land to which they were entitled, and many were cut off from their means of livelihood as their lands were sold to foreigners. This trend in land loss was heightened by the passage of an act in 1850 that allowed all residents, regardless of national citizenship, to own land.[25] In the period following the division of the land, only 28,600 acres—out of more than 4 million total acres—were given to approximately 8,000 farmers; yet 2,000 Westerners who resided on the islands were able to obtain large plots of land, and by the end of the 19th century Westerners had taken over most of Hawaii's privately held land.[26] The Native Hawaiian population dwindled to approximately 40,000 inhabitants.[27] In response to the demand of the sugar industry for arduous labor in the cane fields, more than 400,000 immigrants from China, Portugal, Japan, and the Philippines were drawn to Hawai'i.[28]

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[17] Apology Resolution, S.J. Res. 19, 103d Cong., 1st Sess., Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[18] Michael Dougherty, *To Steal a Kingdom: Probing Hawaiian History* (Waimanalo, HI: Island Style Press, 1992), p. 177 (citing Grover Cleveland, letter to Richard Olney, July 8, 1898).

[19] William Burgess statement, Forum 2000 Transcript, p. 107.

[20] *Compare* Robert C. Schmitt, *Demographic Statistics of Hawaii, 1778–1965* (Honolulu, HI: University of Hawai'i Press, 1968), pp. 14–25, table 6, *with* David E. Stannard, *Before the Horror: The Population of Hawai'i on the Eve of Western Contact* (Honolulu, HI: SSRI, University of Hawai'i, 1989), p. 30. *See also* Herb Kawainui Kane, *Ancient Hawaii* (Honolulu, HI: Kawainui Press, 1997) ("extensive remains support a minimum estimate of 800,000 at that time"), p. 69.

[21] U.S. Department of the Interior and U.S. Department of Justice, "From Mauka to Makai: The River of Justice Must Flow Freely," Report on the Reconciliation Process between the Federal Government and Native Hawaiians, Oct. 23, 2000, p. 21 (hereafter cited as Departments of the Interior and Justice, Reconciliation Report). This document may also be accessed at <http://www.doi.gov/nativehawaiians/report.pdf>.

[22] Ibid., p. 22.

[23] Apology Resolution, S.J. Res. 19, 103d Cong., 1st Sess., Pub. L. No. 103-150, 107 Stat. 1510 (1993). *See* p. 22 for a discussion of church complicity in the overthrow of the Hawaiian Kingdom, subsequent apology, and reparations.

International Domination and Overthrow

During the 1880s, as Hawai'i witnessed significant changes internally, it also faced changing demands and threats to its independence from the international arena. The United States clearly viewed Hawai'i as important to its needs, including economic development and military defense, and as a result sought to establish political dominance. According to the Tyler Doctrine of 1842:

> Considering, therefore, that the United States possesses so very large a share of the intercourse with those islands, it is deemed not unfit to make the declaration that their Government seeks nevertheless no peculiar advantages, no exclusive control over the Hawaiian Government, but is content with its independent existence, and anxiously wishes for its security and prosperity. Its forbearance in this respect, under the circumstances of the very large intercourse of their citizens with the islands, would justify the Government, should events hereafter arise, to require it, in making a decided remonstrance against the adoption of an opposite policy by any other power.[29]

In addition to Friendship Treaties negotiated in 1826 and 1849, the United States entered into a Reciprocity Treaty in 1875 providing for sale of duty-free goods in both directions and lifting the tariff on Hawaiian sugar.[30] Congress later sought exclusive use of Pearl Harbor in exchange for renewing the treaty, but King Kalākaua—who had been duly elected to that position after King Lunalilo failed to name an heir—refused.[31] Supported by an all-Caucasian 500-man militia, American and European sugar planters and business interests responded by forcing Kalākaua to accept major changes in the governmental structure of the kingdom.[32] The resulting "Bayonet Constitution" gave practical control over the executive and legislative branches of government to Western business interests and property owners.

Under the new regime: (1) voting rights were extended to American and European males, regardless of citizenship; (2) new property requirements effectively excluded Native Hawaiians from voting for the newly formed House of Nobles;[33] and (3) exclusive use of Pearl Harbor was ceded to the United States under the 1887 Reciprocity Treaty in exchange for lifting the tariff on Hawaiian sugar.[34] Within two years, King Kalākaua died and his sister, Queen Lili'uokalani, succeeded to the throne pursuant to the kingdom's constitution.[35] American and European residents soon formed a "Committee of Public Safety"—whose goal was to gain full control of the government—in response to two developments: (1) the Queen's efforts to develop a new constitution (as requested in petitions by her Native Hawaiian subjects); and (2) passage of the McKinley Tariff Act of 1891 by the U.S. Congress.[36] Annexation-friendly President Benjamin Harrison reported through channels to the conspirators that "if conditions in Hawaii compel you people to act as you have indicated, and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here."[37]

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[24] Departments of the Interior and Justice, Reconciliation Report, pp. 23–24.

[25] Ibid., p. 24.

[26] Van Dyke, "The Political Status of the Native Hawaiian People," p. 102.

[27] Kane, *Ancient Hawaii*, p. 69.

[28] *See, e.g.*, Rice v. Cayetano, 120 S. Ct. 1044, 1051 (2000) (citing Andrew Lind, *Hawaii's People* (4th ed. 1980), pp. 6–7).

[29] Departments of the Interior and Justice, Reconciliation Report, p. 23 (quoting H.R. Exec. Doc. No. 1 at 39–41 (1894)).

[30] Departments of the Interior and Justice, Reconciliation Report, pp. 23, 26.

[31] *See* Ralph S. Kuykendall, *The Hawaiian Kingdom: 1874–1894*, vol. III (1967), pp. 9–11.

[32] Ibid., p. 26.

[33] Ibid. The U.S. Supreme Court's explication of these events reveals one of several ironies to be found in the *Rice v. Cayetano* decision. The Court cast the "Western business interests and property owners" essentially as soldiers of democracy who "extended the right to vote to non-Hawaiians," but omitted mention of the fact that the Bayonet Constitution disenfranchised naturalized Hawaiian Kingdom subjects of Asian ancestry (to whom the franchise had been extended long before similarly situated Asians in the United States received the right to vote) while permitting *resident aliens* of Caucasian ancestry to vote. *Rice*, 120 S. Ct. at 504. *See, e.g.*, Kuykendall, *The Hawaiian Kingdom*, vol. III, p. 402.

In 1893, the U.S. Minister to Hawai'i, John Stevens, conspired with a small group of non-Hawaiian residents of the islands to overthrow the indigenous government of Hawai'i. U.S. naval forces invaded the sovereign Hawaiian nation on January 16, 1893, with the intent to intimidate the government and Queen Lili'uokalani. The following day, representatives of American and European settlers deposed the Queen and proclaimed the establishment of a provisional government without the consent of the Hawaiian people or the Hawaiian government that had been in place at the time. Many contend that these acts were in violation of the treaties that were in place and in violation of international law. Queen Lili'uokalani, in an attempt to avoid the bloodshed of resistance, yielded her authority to the U.S. government rather than the provisional government.[38] She made the following statement:

> I Lili'uokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.
>
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.[39]

On February 1, 1893, the U.S. Minister raised the American flag and proclaimed Hawai'i to be a protectorate of the United States.[40]

Following the events that occurred in Hawai'i, President Grover Cleveland assigned former Congressman James Blount to investigate the insurrection and overthrow of the Hawaiian government. His investigation concluded that U.S. diplomatic and military representatives had abused their authority and conspired to provoke the change in government.[41] On December 18, 1893, President Cleveland, in a message to Congress, called the overthrow an unconstitutional "act of war" and called for restoration of the Hawaiian monarchy.[42] Although early annexation efforts were unsuccessful, President Cleveland's plea went unheard, and on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawai'i. Six months later, while imprisoned at Iolani Palace, Queen Lili'uokalani was forced to officially abdicate her throne. She would later reflect on the incidents that occurred and write:

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[34] Kuykendall, *The Hawaiian Kingdom*, vol. III, p. 402.

[35] Ibid., p. 474.

[36] Departments of the Interior and Justice, Reconciliation Report, pp. 26–27. *See also* Tom Coffman, *Nation Within, The Story of America's Annexation of the Nation of Hawai'i* (Kāne'ohe, HI: Epicenter, 1998), pp. 109–22.

[37] Coffman, *Nation Within*, p. 117 (quoting B.F. Tracy, Secretary of the Navy). Coffman also discusses meetings with Secretary of State James G. Blaine, who is described as a "lifelong political ally" of John Stevens. Ibid.

[38] Apology Resolution, S.J. Res. 19, 103d Cong., 1st Sess., Pub. Law No. 103-150, 107 Stat. 1510, 1511 (1993).

[39] Dougherty, *To Steal a Kingdom*, p. 169 (citing a statement issued by Queen Lili'uokalani, Jan. 17, 1893).

[40] Apology Resolution, S.J. Res. 19, 103d Cong., 1st Sess., Pub. Law No. 103-150, 107 Stat. 1510, 1511 (1993).

[41] Thomas J. Osborne, *Annexation Hawaii, Fighting American Imperialism* (Waimanalo, HI: Island Style Press, 1998), pp. 60–62.

[42] Ibid., pp. 61–62. *See also* Apology Resolution, S.J. Res. 19, 103d Cong., 1st Sess., Pub. Law No. 103-150, 107 Stat. 1510, 1511 (1993).

> It had not entered our hearts to believe that these friends and allies from the United States . . . would ever . . . seize our nation by the throat, and pass it over to an alien power. Perhaps there is a kind of right . . . known as the "Right of Conquest" under which robbers and marauders may establish themselves in possession of whatsoever they are strong enough to ravish from their fellows. If we have nourished in our bosom those who have sought our ruin, it has been because they were of the people whom we believed to be our dearest friends and allies. . . . [T]he people of the Islands have no voice in determining their future, but are virtually relegated to the condition of the aborigines of [the] American Continent.[43]

In 1896, President Cleveland left office and, under his successor President William McKinley, the United States annexed Hawai'i as a territory (over the express objections of Native Hawaiians[44]) with the signing of the Newlands Joint Resolution. The self-declared Republic of Hawai'i ceded sovereignty over the islands to the United States and further ceded 1.8 million acres (nearly half of the total lands) of Hawaiian lands, without the consent of, or compensation to, the Native Hawaiian people or their government.[45] This is an important point that would serve as a catalyst for later resentment and opposition to the U.S. annexation of Hawai'i. The indigenous people of Hawai'i never directly relinquished their claims to their sovereignty as a people or over their lands. In fact, petitions were signed by more than 21,000 people, more than half of the Native Hawaiian population, objecting to the annexation.[46]

On April 30, 1900, President McKinley signed the Organic Act for the Territory of Hawaii, which provided a government whose leaders were appointed by the United States, and otherwise defined the political structure and powers of the newly established government, as well as its relationship to the United States.[47] It was not until 20 years later that Congress would address an issue critical to Hawaiian subsistence: land ownership and trust responsibilities. In 1921, the Hawaiian Homes Commission Act (HHCA) was signed into law in an attempt to preserve the declining economic and social conditions of Native Hawaiians. It set aside 200,000 acres of land in the federal territory that was later to become the state of Hawai'i, in an attempt to establish a homeland for the native people of Hawai'i.[48] People of 50 percent or more Hawaiian blood were to be the beneficiaries of the act (although the original proposal would have included persons with any Hawaiian blood). Congress designed the program to authorize the leasing of lands for residences, farms, and ranches to Native Hawaiians for 99 years at $1 per year.

On August 21, 1959, Hawai'i became the 50th state of the Union, but not without both active and passive opposition from Native Hawaiians. Any American citizen who had resided in Hawai'i for one year was eligible to vote to determine whether Hawai'i would become a state,[49] thus overshadowing the wishes of many Native Hawaiians. After statehood, public lands were transferred to the state to manage, with the exception of those held by the federal government.[50] One of the conditions for land management was the betterment of conditions for Native Hawaiians. In addition, the new state had to agree to administer the HHCA as a trustee for the benefit of Native Hawaiian beneficiaries and incorporate the HHCA into the state's constitution.[51] To this day, however, many argue that the state and federal governments have not met the established trust obligations, and many people who were scheduled to receive lands have not been given their rightful lot.[52]

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[43] Lydia Lili'uokalani, *Hawaii's Story by Hawaii's Queen* (Boston, MA: Lothrop, Lee & Shepard Co., 1898), pp. 368–71.

[44] Kanalu Young, statement before the Hawaii Advisory Committee to the U.S. Commission on Civil Rights, "The Status of Native Hawaiian Civil Rights Five Years after the Passage of the Apology Bill," community forum, Honolulu, HI, Aug. 22, 1998, transcript, vol. 1, pp. 93–94 (hereafter cited as Forum 1998 Transcript) (discussing national archival research by Noenoe K. Silva, who uncovered petitions signed by thousands of Native Hawaiians opposed to annexation); Pomai Kai Kinney statement, Forum 1998 Transcript, vol. 2, pp. 331–32. *See* Nalani Minton and Noenoe K. Silva, *Kū'ē: The Hui Aloha 'Āina Anti-Annexation Petitions 1897–1898* (Honolulu, HI: 1998); Noenoe K. Silva, "Kanaka Maoli Resistance to Annexation," 1997, *reprinted in* Minton and Silva, *Kū'ē: The Hui Aloha 'Aina Anti-Annexation Petitions*, pp. 1–55.

[45] Apology Resolution, S.J. Res. 19, 103d Cong., 1st Sess., Pub. Law No. 103-150, 107 Stat. 1510, 1512 (1993). A protest song that continues to be sung to this day recounts that many Native Hawaiians refused to sign a loyalty oath required by the Republic of Hawaii, stating that they would rather lose their jobs and eat rocks than give up their land. *See* Noenoe K. Silva, *Kanaka Maoli Resistance to Annexation, 'Ōiwi: A Native Hawaiian Journal*, vol. 1 (Honolulu, HI: Kuleana 'Ōiwi Press, 1998), p. 51. The *Mele 'Ai Pōhaku* (Rock-Eating Song), also known as *Kaulana Nā Pua* (Famous Are the Children), has a sweet melody that belies the bitterness of its lyrics. Albert J. Schütz, *The Voices of Eden* (Honolulu, HI: University of Hawai'i Press, 1994), pp. 353–54. By vowing to "eat rocks" rather than sign the loyalty oath, Native Hawaiians embraced and relied upon deep cultural values. *See* Charles Maxwell, statement, Forum 1998 Transcript, vol. 2, p. 249. Kahu Maxwell explained that 'āina, or land, must be understood in the context of the Kumulipo. "I want to clarify some of the points you made about the word 'āina. 'Ai means to 'to eat.' Nā means 'the.' So the land, for the Hawaiian people, means 'the food, sustenance.' It's the mythical association to the land, even to the rock, the pōhaku. It says 'ai pōhaku, which means 'to eat the rock.' But the land is that sacred. It is the sustenance of, the core of, the Hawaiian people." Ibid.

[46] Departments of the Interior and Justice, Reconciliation Report, p. 29.

[47] Ibid., p. 31 (citing An Act to Provide for a Government for the Territory of Hawaii (Organic Act), 31 Stat. 141, 56th Cong., Sess. 1 (1900)).

[48] Ibid. (citing Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921)).

HAWAI'I TODAY: DIVERSITY AND DISPARITY

> *The fantasy of happy, healthy natives living a life of ease and security, in a bountiful and lush paradise contrasts sharply with the realities of existence for many Hawaiian-Americans: they have been alienated from their land, their numbers diminished by disease, they have lost political power, they are economically insecure, and are troubled by health, education, and social problems out of proportion to their numbers in the population.*[53]

The islands of Hawai'i are an amalgam of immigrants of diverse backgrounds, including Japanese, Chinese, Filipino, Portuguese, and mainland-born Americans. Some argue that this diverse population has not hindered the ability of individual cultures to coexist. In testimony before the Hawaii Advisory Committee, Dr. Kenneth Conklin, a retired high school mathematics teacher and former university professor from Massachusetts, argued that despite the influx of immigrants to Hawai'i and the westernization of the islands, Native Hawaiians have been successful at preserving their culture. He stated:

> [O]ver the last 20 years or so, there has been a powerful resurgence of Hawaiian culture and that has taken place under the auspices of the existing governmental system where all people have equal rights under the law.
>
> There are many, many different cultures in Hawai'i. All of us are in the minority here. The various cultures of immigrants have done quite well in maintaining and preserving their culture, and the Hawaiian renaissance of the last 20 years has been extraordinarily powerful.[54]

Others argue, however, that the result of the influx of immigrants has been the alienation of Native Hawaiians who have become outsiders in their own land, losing economic and political power to the more affluent immigrant inhabitants. The U.S. government acknowledged in the Apology Resolution of 1993 that the long-range economic and social changes in Hawai'i during the 19th and early 20th centuries have been devastating to the population, health, and well-being of the Hawaiian people. The question of how to remedy the situation, however, remains a difficult one to answer.

Who Is Hawaiian?

The history of Hawaiian annexation and the subsequent cultural domination of the island's people have resulted in a painful search for identity and self-realization for many in the Native Hawaiian community. By many accounts, the colonization deprived Native Hawaiians of their fundamental human right to identify as an independent indigenous group through cultural practices. According to Dr. Lilikalā Kame'eleihiwa:

> When we look at all of the people who were citizens in the Kingdom of Hawaii, who was most deprived of rights and who was most targeted with racism after the overthrow and with the taking of Hawai'i as an American territory? And I submit to you that was Native Hawaiians.

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[49] Ibid., p. 37.

[50] Ibid., p. 36 (citing Hawaii Statehood Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4).

[51] Ibid.

[52] The Hawaii Advisory Committee has studied and reported on these matters in its two previous reports: *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, 1991; and *Breach of Trust? Native Hawaiian Homelands*, 1980.

[53] Ronald Gallimore, Joan Whitehorn Boggs, and Cathie Jordan, *Culture, Behavior and Education: A Study of Hawaiian-Americans* (Beverly Hills, CA: Sage Publications, 1974), p. 14.

[54] Kenneth Conklin statement, Forum 2000 Transcript, p. 54.

> First of all, Native Hawaiians refused to . . . swear an oath of allegiance to the Republic of Hawai'i, refused to speak English even though Hawaiian language was banned, and in the territorial legislatures, spoke Hawaiian. They refused. They were breaking the law. They refused to agree that America had a right to be in the country. These are important facts to look at because what happens then, of course, is that they don't get jobs, they don't get opportunities for economic advancement. . . .
>
> So who suffered? Whose identity suffered? Who had to give up their Hawaiian names, the names of their ancestors who shaped our own character? It was [Native] Hawaiians. That kind of anti-Hawaiian behavior that we saw with America saying everybody should be American and no one in Hawai'i, in the territory, no one was supposed to have a Hawaiian name, that impacted us the most.[55]

It is not surprising, then, that there is much disagreement about how to define who is Native Hawaiian, adding to the tensions between factions. Interestingly, foreigners in Hawai'i a century ago were classified according to cultural groups (such as American, British, and Chinese) and not by racial terms. It is speculated that the concept of race was not introduced until the annexation of the islands.[56] The term "Hawaiian" is itself non-Hawaiian. Early Hawaiians referred to themselves as Kānaka Maoli, which translates to mean true or real person.[57]

Annexation of Hawai'i by the United States brought with it an awareness of the racial practices of the mainland, which were then emulated, as in the population census. After Hawai'i became a state, census classifications of race that were used in the continental United States were arbitrarily applied to Hawaiians. The unfamiliar connection between race and color was formally introduced in Hawai'i with the 1960 census.[58] Because of unfamiliarity with the imposed definitions and the lack of specificity in earlier census counts, it would seem impossible to know with any degree of certainty, based on census data alone, the true number of Hawaiians and part-Hawaiians inhabiting the islands at that time.

Today, there is a more specific, and in many ways more divisive, method for categorizing Hawaiian people. As defined by the state's Office of Hawaiian Affairs, and consistent with modern federal definitions, "Native Hawaiian" (with a capital "N") refers to all persons of Hawaiian ancestry, regardless of blood quantum; "native Hawaiian" (with a lower case "n") refers to those with 50 percent or more Hawaiian blood.[59] However, who qualifies as a beneficiary of programs for Native Hawaiians depends on the guidelines of the agency or enabling statute responsible for the program. For example, the Department of Hawaiian Home Lands must follow the definition provided by the 1921 Hawaiian Homes Commission Act: "The term 'native Hawaiian' means any descendant of not less than one-half of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[60] Some state programs use either "Hawaiian" or "Part Hawaiian" for classification purposes. Still others use lower blood requirements for categorization. For example, the State of Hawai'i Department of Health's Health Surveillance Program includes in its counts individuals with any measure of Hawaiian blood, making its estimate of the number of Hawaiians inhabiting the islands significantly higher than even the self-identified count of the census.[61]

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[55] Kame'eleihiwa statement, Forum 2000 Transcript, pp. 76–79.

[56] Lind, *Hawaii's People*, pp. 19–20.

[57] Richard Kekuni Blaisdell, "Native Hawaiian 1992," afterword in Dougherty, *To Steal a Kingdom*. *See also* Pukui and Elbert, *Hawaiian Dictionary*, p. 127 (defining Kanaka Maoli as "true human" and noting the plural form Kānaka); ibid., p. 240 (defining Kanaka Maoli as "Hawaiian native").

[58] Lind, *Hawaii's People*, p. 25. There is no precise word for "race" in the Hawaiian language. The closest term is lāhui, which is also defined to mean nation, tribe, people, or nationality. Pukui and Elbert, *Hawaiian Dictionary*, pp. 190, 509.

[59] State of Hawai'i, Office of Hawaiian Affairs, *Native Hawaiian Data Book–1998*, "Definitions of Race," pp. 600–01 (hereafter cited as OHA, *Native Hawaiian Data Book–1998*). *See also* footnote 2 above.

[60] Ibid., p. 600 (citing Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921)). Designated homestead lease successors (spouse or child) may be one-quarter, or 25 percent, Hawaiian. HHCA § 209, *reprinted in* HAW. REV. STAT. 191, 211 (1993). Joint Resolution to Consent to An Amendment Enacted by the Legislature of the State of Hawai'i to the Hawaiian Homes Commission Act, 1920, Pub. L. No. 99-557, 100 Stat. 3143 (1986). Members of the Hawaiian Homes Commission "shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act, Pub. L. No. 67-34, ch. 42, § 202, 42 Stat. 108 (1921).

In 1960, the year after Hawaii's statehood, the U.S. Census Bureau listed Hawaiians under the category of "Others."[62] In subsequent years, Native Hawaiians fell within the census category of "Asian or Pacific Islander." Many Hawaiians felt that including them in this category resulted in inadequate data for monitoring their social and economic conditions because they were overwhelmed by the aggregate data of much larger Asian groups. Thus, in the 2000 census "Native Hawaiian or Other Pacific Islander" was made a separate category for the first time.[63] Based on Office of Management and Budget (OMB) directives, this category includes persons "having origins in any of the original people of Hawai'i, Guam, Samoa, or other Pacific Islands." The directives clearly state that the term "Native Hawaiian" does not include individuals who are native to the state of Hawai'i by virtue of being born there.[64] No established criteria or qualifications (such as blood quantum levels) are used to determine an individual's race or ethnic classification for census purposes.[65] (These will be important points for the following discussions surrounding programs benefiting Native Hawaiians and the implications of the *Rice* decision.)

The classification of who is N(n)ative Hawaiian for programmatic, policy, and census purposes lies in conflict with how many of Hawaii's people self-identify. Many who consider themselves direct descendents of Hawaii's indigenous people feel strongly about self-identification, which is seen as an important validation of their heritage. Those Native Hawaiians who spoke before the Hawaii Advisory Committee were passionate in their expressions of identity, as expressed by A'o Pohaku Rodenhurst, a Native Hawaiian kupuna:

> [W]e are proud to be Hawaiians. We have always been proud to be Hawaiians. There is no place we can go to be Hawaiians but here. We take pride in the sacredness of this land that was built by our forefathers and the gods of our land that have taught people healing called ho'oponopono. . . .
> [W]e live in peace. But nobody of the American government has made peace for us . . . , but [they] want to force us to be Americans, force us to share everything, even our ethnicity. They tried to steal our identity by claiming they are Hawaiians. They are not Hawaiians. We will never give this up.
>
> People who do not have culture cannot understand this. People who are raised just colonized cannot begin to understand the pain and the suffering of what our ancestors went through, losing their lands, their identity, and being kicked to the curb by colonization and foreign laws and rules.[66]

The testimony of Dr. Richard Kekuni Akana Blaisdell, a physician and professor of medicine at the University of Hawai'i, further illustrated the importance of self-identification and the frustration of being labeled by outsiders:

> We are Kānaka Maoli. In a very important sense, we are not Hawaiian. We are not Native Hawaiian with a lowercase nor an uppercase capital "N." We are not Americans. We are not Native Americans. We are Kānaka Maoli. That is a name by which our ancestors identified themselves. That is the way and the manner in which we identify ourselves. So every time one of us, one of you, uses any of these other terms, these colonial and colonized terms for us, you are, in a sense, demeaning us.[67]

Even among Hawaiians, however, there is disagreement over who is truly Native Hawaiian. Some take a more inclusive approach. For example, in her statement before the Hawaii Advisory Committee at the 2000 forum, Dr. Lilikalā Kame'eleihiwa, director of the Center for Hawaiian Studies, University of Hawai'i at Mānoa, cited to the United Nation's Draft Declaration on the Rights of Indigenous People, which states that "indigenous peoples have [the] collective and individual right to maintain and develop distinct ethnic and cultural characteristics and identities, including the right to self-identification."[68] According to Dr. Kame'eleihiwa, this right has been abrogated by the American government's requirement that Native Hawaiians be 50 percent blood quantum. She stated that her people believe Native Hawaiians are any blood quantum.[69]

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[61] OHA, *Native Hawaiian Data Book–1998*, "Population: Past and Present," p. 8. The Health Surveillance Program estimates that Hawaiians make up 19 percent of Hawaii's population, as compared with the census estimate of 12.5 percent. Ibid. Although disputed by some, it is generally accepted that the conditions of Native Hawaiians are worse than those of other ethnic groups in Hawai'i. *See, e.g.*, Forum 2000 Transcript, pp. 173–77 (questions and comments by Commissioner Elsie Meeks, Clayton Hee, Commissioner Yvonne Lee, and Ray Soon, regarding statistics).

[62] Blaisdell, "Native Hawaiian 1992," in Dougherty, *To Steal a Kingdom*, p. 183.

[63] Office of Management and Budget, Executive Office of the President, "Revisions to the Standards for Classification of Federal Data on Race and Ethnicity," 62 Fed. Reg. 58782 (Oct. 30, 1997).

[64] Ibid.

[65] Ibid.

[66] A'o Pohaku Rodenhurst statement, Forum 2000 Transcript, pp. 324–25.

[67] Richard Kekuni Blaisdell statement, Forum 2000 Transcript, p. 18.

On the other end of the spectrum, however, are those who believe that individuals with only "one drop" of Hawaiian blood are not Native Hawaiians, as expressed by Emmett Lee Loy, a Native Hawaiian attorney who spoke at the 2000 forum. He believes that attempts to lower the blood requirement are strategically designed to support the interests of those who want recognition legislation passed. "What they're trying to do is broaden the class so much that the State of Hawai'i is allowed to shirk its obligations to the 50-percent-plus blood quantum."[70] He contends that the requirements established by the Hawaiian Homes Commission Act are the ones that should remain in effect.

Others spoke out in the 2000 forum saying that the practice of defining who is Hawaiian by blood quantum pits Hawaiians against each other, in effect causing them to compete for both recognition and the limited available resources. William Lawson, a Hawai'i resident, spoke to this issue by stating that the existence of a blood quantum level:

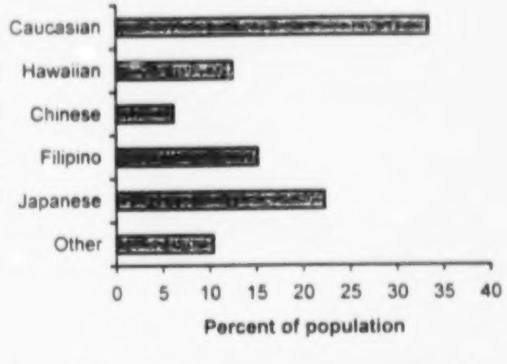
> is a blatant discriminatory mandate whereby those of Hawaiian ancestry with 50 percent or higher blood quantum have been pitted against those of less than 49 percent quantum or less of the qualifying mandate. What blood quantum makes a Caucasian a Caucasian or what quantum makes a Filipino a Filipino or an Afro-American an Afro-American, and so on and so forth?[71]

Demographics

As has been discussed, the once-robust Hawaiian population faced a severe reduction in the years following European contact. In fact, after the first official census of the islands in 1853, it was estimated that the population of Native Hawaiians was approximately 71,000 people.[72] One century after European contact, the population of Native Hawaiians had declined nearly 80 percent. In the period between 1853 and 1896, the percentage of inhabitants who were Native Hawaiian decreased from 95.8 percent to 28.5 percent of the total population. During that same period, the percentage of inhabitants who were part Hawaiian increased from 1.3 percent to 7.8 percent.[73] Much of the population decrease was the result of diseases brought by European settlers and was accelerated by low fertility rates, high infant mortality, poor housing, inadequate medical care, inferior sanitation, hunger and malnutrition, and alcohol and tobacco use. Many of these unfortunate realities still exist today, more than two centuries since European contact.[74]

FIGURE 1

Racial Composition of Hawai'i, 1990



SOURCE: State of Hawai'i, Office of Hawaiian Affairs, *Native Hawaiian Data Book–1998*, p. 8 (Census Bureau, self-identification).

During the last century, while there has been an overall increase in Hawaii's population by sevenfold, most of the increase can be attributed to an influx of foreign laborers who were brought to the islands to compensate for the limited availability of local labor.[75] By 1990, the total population of Hawai'i was approximately 1.1 million, with 12.5 percent (138,742) being Native Hawaiian and 87.5 percent being non-Hawaiian.[76] (By 1999 it was estimated that the total population of Hawai'i was close to 1.2 million.[77]) Also in 1990, the most recent year from which census data are available, 33.4 percent of Hawaii's population was Caucasian, 22.3 percent was Japanese, 15.2 percent was Filipino, 6.2 percent was Chinese, and 10.4 percent was of other races or ethnicities.[78]

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[68] Draft Declaration on the Rights of Indigenous Peoples As Agreed upon by the Members of the Working Group at its Eleventh Session, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex 1, Agenda Item 14, at 50, art. 6, U.N. Doc. E/CN.4/Sub2/1993/29 (1993); Kame'eleihiwa statement, Forum 2000 Transcript, p. 33.

[69] Kame'eleihiwa statement, Forum 2000 Transcript, p. 33.

[70] Emmett Lee Loy statement, Forum 2000 Transcript, p. 246.

[71] William Lawson statement, Forum 2000 Transcript, p. 278.

[72] Lind, *Hawaii's People*, p. 16.

[73] OHA, *Native Hawaiian Data Book–1998*, "Population: Past and Present," p. 4.

[74] Ibid.

Today, most Native Hawaiians are of mixed ancestry, and it is estimated that fewer than 6,000 full-blooded Hawaiians remain.[79] In 1984, the Office of Hawaiian Affairs conducted the only modern-day study of Native Hawaiian blood quantum. It found that one in three Native Hawaiians had between 50 and 100 percent blood quantum while only one in 25 Native Hawaiians had 100 percent blood quantum. More than 60 percent of Native Hawaiians had less than 50 percent blood quantum.[80] Individuals 18 years of age and younger make up the majority of the Native Hawaiian population, and while the median age of Hawai'i residents is 32.6 years, the median age of Native Hawaiians is 25.8 years.[81]

Socioeconomic Profile of Hawaiians Today

An understanding of the socioeconomic status of Native Hawaiians is necessary to conceptualize the potential implications of the *Rice* decision and any future decisions that question the right of Native Hawaiians to maintain a special relationship with the State of Hawai'i and the federal government. The socioeconomic statistics depicting Native Hawaiians are startling, lending credence to the need for initiatives aimed at empowerment and the betterment of the Hawaiian condition. For example, in comparison to other residents of Hawai'i, Native Hawaiians have disproportionately low levels of employment, homeownership, income security, and education. Conversely, they have disproportionately high levels of substance and physical abuse, medical problems, impaired mental health, and homelessness.[82]

Income

Reviewing the economic standing of Native Hawaiians provides evidence of the disparities that exist between racial and ethnic groups in Hawai'i. While the median family income has generally increased in Hawai'i over the years, Native Hawaiians remain at the bottom of the economic ladder with one of the lowest family income averages of any racial group. According to the 1990 census, the average family income for Native Hawaiians is $9,000 less than the average family income for the state.[83] Native Hawaiians are also the largest racial group with families below the poverty level, with families on public assistance, and with individuals 200 percent below the poverty level.[84] While 89 percent of the Native Hawaiian population was employed in 1997, this is the lowest employment rate of any racial or ethnic group in Hawai'i.[85] It is estimated that 6.4 percent of the total civilian labor force in Hawai'i is unemployed. Comparatively, 10.8 percent of the Native Hawaiian civilian labor force is unemployed.[86] (It should be noted that it is also unclear how many of these workers are only employed part time.)

In addition to having lower employment rates overall, Native Hawaiians are also disproportionately represented in a few industries. While they make up 10.8 percent of employed persons over age 16, they are overrepresented in the entertainment and recreation (15.3 percent), transportation, communications, and public utilities (15.1 percent), and construction (14.5 percent) industries.[87] By far, and not surprising given the tourism industry's prevalence in Hawai'i, the largest numbers of Native Hawaiians are employed in retail trade (9,823). There are also occupational areas in which Native Hawaiians are over- or underrepresented.[88] Most notably, Native Hawaiians are missing from the ranks of managers and other professionals. Only 7.4 percent of employed Native Hawaiians are in managerial or professional specialty occupations. On the other hand, approximately 17 percent are operators, fabricators, and laborers; and 12.8 percent are in service occupations, clustered most notably in police and firefighting jobs.[89]

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[75] Ibid., p. 6

[76] It should be noted, as discussed previously in this section, that the definition of "Hawaiian" has changed over the years.

[77] U.S. Census Bureau, Population Division, Population Estimates Program, accessed at <http://www.census.gov/population/estimates/county/co-99-1/99C1_15.txt>.

[78] OHA, *Native Hawaiian Data Book–1998*, "Population: Past and Present," p. 8.

[79] Blaisdell, "Native Hawaiian 1992," in Dougherty, *To Steal a Kingdom*, p. 183

[80] OHA, *Native Hawaiian Data Book–1998*, "Blood Quantum," p. 30.

[81] Ibid., "Population: Past and Present," p. 25

[82] Office of Hawaiian Affairs, *Fiscal Annual Report 1999*, p. 16.

[83] OHA, *Native Hawaiian Data Book–1998*, "Income Profile," p. 516.

[84] Ibid., "Family Profile," p. 50.

[85] Ibid., "Labor Force Profile," p. 552.

[86] Ibid., "Unemployment Profile," p. 584.

[87] Ibid., "Employment Profile," pp. 562–64.

Native Hawaiians are also less likely than other racial or ethnic groups to own their own businesses. In 1987 (the most recent year for which these data are available) only 8.1 percent of all minority-owned business firms in Hawai'i were owned by Native Hawaiians, as compared with 50.2 percent owned by persons of Japanese descent, 15.8 percent owned by those of Chinese descent, and 12.4 percent by those of Filipino descent.[90]

As a result of lower earnings and job stratification, Native Hawaiian households receive public financial assistance at more than twice the rate (14.5 percent) of the rest of the state (6.8 percent).[91] In two areas of the state, Wahiawā and Waipahu, as many as one-third of the Native Hawaiian households receive public assistance.[92] Native Hawaiians are also the largest single ethnic group in Hawai'i receiving Aid to Families with Dependent Children (AFDC) and food stamps. It is speculated that this is due to the large number of single-parent families and the generally low family income levels of Native Hawaiians.[93] While Native Hawaiians make up 9 percent of the married couple families in Hawai'i, they make up close to 18 percent of the female head of household families.[94] If one looks at individuals receiving assistance rather than households, the number increases dramatically, with 27.4 percent of the individuals receiving assistance being Native Hawaiian (in 1997).[95]

Education

Educational attainment is directly related to income and standard of living. Based on the socioeconomic disadvantages discussed thus far, it should come as no surprise that once again Native Hawaiians fare worse than other residents of Hawai'i. The majority of students in Hawai'i are enrolled in public schools (83 percent) at a rate slightly less than the national public school enrollment of 89 percent. In the 1997–1998 academic year, 47,435 (or more than 25 percent) of Hawaii's public school students were Native Hawaiians.[96]

Despite their visible presence in the public school system, Native Hawaiian students do not appear to derive the same benefits from the educational experience as their non-Hawaiian classmates. Beginning at an early age, educational disparities are evident. According to standardized test scores, based on the Peabody Picture Vocabulary Test-Revised (PPVT-R), and given the kinds of schools that exist, Native Hawaiian and Filipino children are less ready for kindergarten success than other children.[97] (However, successful experiences with the Hawaiian Language Immersion Program, discussed below, may affect this conclusion. For example, enrollments in Hawaiian language courses at the University of Hawai'i have grown significantly in recent years.)

The lack of educational achievement of older Native Hawaiian students also reflects a disturbing pattern. Only slightly more than 50 percent of Native Hawaiians between the ages of 18 and 24 have earned a high school diploma or equivalent. According to the 1990 census, approximately 23 percent of Native Hawaiians over the age of 25 have not graduated from high school or earned a high school equivalent.[98]

As would be expected given these educational outcomes, relatively few Native Hawaiians attend college. In fall 1997 approximately 6,200 Native Hawaiian students were enrolled in the University of Hawai'i system, making up 13.6

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[88] Note that these statistics reflect only Native Hawaiians living in Hawai'i. Ibid., pp. 568, 570.

[89] Ibid., pp. 568–70.

[90] Ibid., "Minority-Owned Business Firms in Hawaii: 1987," p. 575.

[91] Ibid., "Public Assistance," p. 262.

[92] Ibid., p. 264.

[93] Ibid., "Types of Public Assistance," p. 270.

[94] Ibid., "Housing Profile," p. 104.

[95] Ibid., "Summary and Conclusions," p. 299.

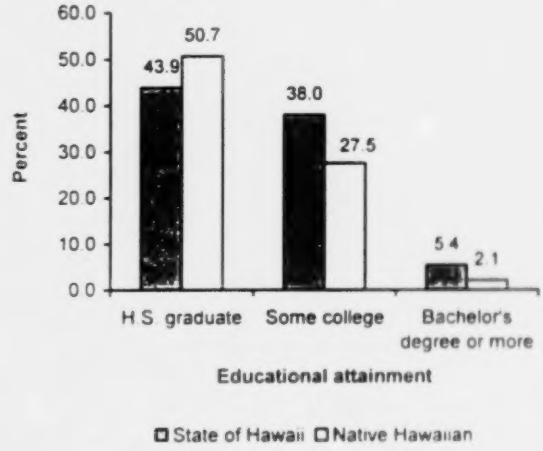
[96] Ibid., "School Enrollment," p. 204.

[97] Ibid., p. 212.

[98] Ibid., "Education Outcomes," p. 234.

percent of the university's student body.[99] (According to the 1990 census there were another 7,840 Native Hawaiians attending college on the U.S. mainland, although it is unclear whether they are Hawaiians who left the islands to pursue an education or whether they are Hawaiians raised on the mainland.[100]) The University of Hawai'i system includes three four-year campuses and seven community colleges. Approximately one-third of Native Hawaiians in the system attend one of the three university campuses; the remaining two-thirds attend one of the community colleges.[101]

FIGURE 2
Educational Attainment of Native Hawaiians in Hawai'i, 1990



SOURCE: State of Hawai'i, Office of Hawaiian Affairs, *Native Hawaiian Data Book–1998*, p. 234.

Enrollment numbers are not an indication of graduation rates. Only 27.5 percent of Native Hawaiians between the ages of 18 and 24 have some college or an associate degree, and only 2.1 percent of that age group have a bachelor's degree or higher.[102] Native Hawaiians or Part Hawaiians earned only 10.2 percent (777) of all degrees awarded in academic year 1996–1997.[103] Of the 777 degrees earned by Native Hawaiians in the 1996–1997 school year, the most common degrees earned were bachelor's (277), associate in science (189), and associate in arts (131). Only 17 Native Hawaiians received professional degrees such as law or medicine, and only one received a doctoral degree.[104]

According to Dr. Lilikalā Kame'eleihiwa, director of the Center for Hawaiian Studies, University of Hawai'i at Mānoa, Native Hawaiians are not encouraged to attend the university. This problem begins in the public school system, where large numbers of Native Hawaiians do not complete high school. In addition, there is a lack of emphasis on Hawaiian studies, which compounds Native Hawaiians' lack of participation in educational programs. For example, according to Dr. Kame'eleihiwa, the curriculum she teaches is seriously underfunded at the University of Hawai'i, and there are only five professors, who teach 1,500 students each year. She stated that the university is an unfriendly place for Native Hawaiians because of the prevalence of anti-Hawaiian bias there. Seventy-five percent of the professors at the University of Hawai'i are white, and only 2 percent of the tenured faculty are Native Hawaiian.[105]

Despite these barriers, this academic year the number of Native Hawaiian undergraduate students has increased to 10 percent, a figure that is larger than past years. It is predicted that by the 2005–2006 academic year, 8,466 Native Hawaiian students will be enrolled in the University of Hawai'i system. Dr. Kame'eleihiwa attributes this attendance rate to the money allocated for tuition waivers and financial aid from the federal government, without which many Native Hawaiian students would not be in school.[106]

Also important to increasing the numbers of Native Hawaiians in college is the creation of an environment that fosters self-identity and cultural pride. Nancy Stone, former teacher and a non-Hawaiian candidate for the Office of Hawaiian Affairs' board of trustees, testified before the

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[99] Ibid., "School Enrollment," pp. 220–23.

[100] Ibid., pp. 225–26.

[101] Ibid., p. 220. Although a site has been designated for the University of Hawai'i at West O'ahu, courses are being taught and administrative functions carried out in portable and other facilities at the Leeward Community College.

[102] Ibid., "Education Outcomes," p. 234.

[103] Ibid., p. 230.

[104] Ibid., p. 232.

[105] Kame'eleihiwa statement, Forum 2000 Transcript, pp. 56–57.

[106] Ibid.

Hawaii Advisory Committee about her experiences teaching in Hawai'i:

> I've seen, as a teacher in this state, firsthand what happens to the children here and it breaks my heart and I can't teach here anymore. They fail to recognize who these people are and what they love, their traditional Hawaiian values that they learn at home, and yet they go into school and they're taught a whole new system and they're taught not to feel good about themselves and not to cherish those things, and there's a conflict.[107]

There have been attempts to include the Hawaiian culture within the school system, for example through the Hawaiian Language Immersion Program. In the program, students are taught the content of the regular education program in the Hawaiian language. In the 1997–1998 academic year, there were 1,351 students enrolled in the immersion program.[108] It is projected that this number will increase to 3,397 by the 2005–2006 academic year.[109]

Dr. Kame'eleihiwa is also in the process of establishing a research institute that would create new curriculum for the 48,000 Hawaiian children not served by the Hawaiian immersion schools. She testified at the forum that:

> The curriculum currently in English that our children are faced with every day and, of course, all the non-native children read as well, is really racist. It's very anti-Hawaiian. We need to change it. We need to do better than we have done in the past. This terrible curriculum has contributed greatly to the poor self-image of our children. It feeds into higher rates of drop out from high school, also the high rates of suicide and crime and eventual prison that our people face.[110]

Dr. Peter Hanohano, director of the Native Hawaiian Education Council, agreed stating that native and indigenous people around the world have "all suffered from colonization and the impact and the clash of cultures." He contends that the education Native Hawaiians need is "education for self-determination," whereby education is used as a vehicle for personal and cultural growth.[111]

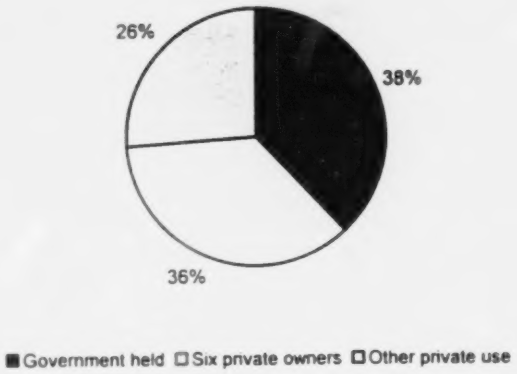
Land

The relationship with and respect for the land is an important aspect of Hawaiian culture. According to testimony given by Dr. Kame'eleihiwa:

> From time immemorial, Native Hawaiians have had a special genealogical relationship to the Hawaiian islands. . . . As such, we have an ancient duty to love, cherish, and cultivate our beloved grandmother, the land. The study of stewardship is called mālama 'āina where land is not for buying and selling, but for the privilege of living upon. And in the reciprocal relationship, when we Native Hawaiians care for and cultivate the land, she feeds and protects us.[112]

FIGURE 3

Land Distribution in Hawai'i



SOURCE: State of Hawai'i, Office of Hawaiian Affairs, *Native Hawaiian Data Book–1998*, p. 199.

The land is viewed as the main mode of subsistence for Native Hawaiians. Dr. Blaisdell stated:

> By "land" we mean our sacred environment. Without it, we are not a people, we have no culture. Our existence is oneness with our sacred environment. . . . [I]t's the land that feeds us. That's what the term 'āina means, land which feeds us. We

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[107] Nancy Stone statement, Forum 2000 Transcript, p. 309.

[108] OHA, *Native Hawaiian Data Book–1998*, "Language," p. 242. Non-Hawaiian children are also enrolled in these programs.

[109] Ibid., p. 244.

[110] Kame'eleihiwa statement, Forum 2000 Transcript, p. 28.

[111] Peter Hanohano statement, Forum 2000 Transcript, p. 26.

[112] Kame'eleihiwa statement, Forum 2000 Transcript, pp. 29–30. The testimony of Dr. Kame'eleihiwa is quoted in greater detail above. *See* text accompanying footnote 11.

> don't eat unless we have land. What we eat has to be junk food, processed food, and that's why we have the highest rates for obesity and hypertension and diabetes and heart disease. So the only answer to our survival is to return all of our lands.[113]

Since Westerners first began to occupy the land that once belonged to Native Hawaiians, a recurring issue for Native Hawaiians has been land ownership and land entitlement. In an attempt to remedy the effects of the overthrow of Hawai'i on Native Hawaiians, the Hawaiian Homes Commission Act was passed in 1921. The purpose was to set aside 200,000 acres of land for homesteading by Native Hawaiians. However, the lands available to Native Hawaiians through the Hawaiian Homes Commission Act traditionally have not been suited for living and development. The highly productive agricultural and forest lands were already disposed of to private interests and so, according to Ray Soon, chairman of the Hawaiian Homes Commission, the Hawaiian Homes Program was left with river beds, mountain cliffs, and other unusable lands, as well as lands in distant islands with fewer job opportunities.[114]

Land use and land ownership have also dramatically changed during the period since Western occupation, with an increase in nonagricultural uses of the land. Today, the state and federal governments and six private landholders administer most of the land.[115] In all, government (federal, state, and county combined) owns about 38 percent of Hawaii's land. The six private landholders own another 36 percent, leaving 26 percent of the lands for other private use.

In 1996, approximately 95 percent of all lands in Hawai'i were designated as conservation and agricultural districts, while urban land made up 4 percent. Increasing competition for use of available land and increasing demand for housing are forcing the reclassification of lands currently designated for conservation and agricultural uses.[116] Approximately 73.6 percent of Hawaii's population live in a metropolitan area.[117] Further, nearly two-thirds of the Native Hawaiian population still living in Hawai'i reside in the urbanized areas of the city and county of Honolulu.[118] In light of these developments, the ceded lands and Hawaiian homelands proved a key source of potential land to ease overcrowding. Native Hawaiians are outraged by this prospect.

As of January 1995, about 14 percent of the state's public lands were allocated to the Department of Hawaiian Home Lands.[119] Only 21 percent of the Hawaiian homelands are currently being used for homesteads.[120] Nearly 19,000 Native Hawaiian applicants are still waiting for their share of the remaining lands.[121] Thousands of others who were on the waiting list for homelands have died without receiving their allotment.

Provoked by a history of mismanagement of ceded lands, Native Hawaiian groups want to regain control over their fair share of the one million plus acres held under the Ceded Lands Trust and the Hawaiian Home Lands Trust, currently administered by the State of Hawai'i. Native Hawaiians, although beneficiaries of the trust, thus far have not benefited much from the state's administration of the lands.

Housing

As has been discussed, the immigration of Western settlers and the occupation of once-Hawaiian soil limited the land available for use by Native Hawaiians. In the modern era, the housing shortage experienced by Native Hawaiians is the result of several factors, including overpopulation, limited available land for development, and high costs.[122] Although housing conditions have improved in recent years, few Native Hawaiians are homeowners. Most Native Hawaiians either share homes with their parents or other relatives or live in crowded rental units.[123] Between 1980 and 1995, the number of housing units in Hawai'i increased by nearly 30 percent.[124] However, the 1990 census estimated that only 10 percent of the housing units in Hawai'i were occupied by Native Hawaiians, as compared with nearly 40 percent occupied by Caucasians.[125] Further, the number of persons per household is larger for Native Hawaiians at close to 4.0 than for any other racial or ethnic group, except for Filipinos.[126]

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[113] Blaisdell statement, Forum 2000 Transcript, p. 55.

[114] Ray Soon statement, Forum 2000 Transcript, p. 168.

[115] OHA, *Native Hawaiian Data Book–1998*, "Land," p. 163.

[116] Ibid., "Land Use," p. 166.

[117] U.S. Census Bureau, "Statistical Abstract of the United States, 1999," accessed at <http://www.census.gov/statab/www/states/hi.txt>.

[118] OHA, *Native Hawaiian Data Book–1998*, "Population: Past and Present," p. 12.

[119] Ibid., "Land Use," p. 172.

[120] Ibid., "Summary and Conclusions," p. 199.

[121] State of Hawai'i, Department of Hawaiian Home Lands, *Annual Report FY 1997–1998*, p. 15.

[122] OHA, *Native Hawaiian Data Book–1998*, "Summary and Conclusions," p. 159.

[123] Ibid., "Housing," p. 79.

The characteristics of Native Hawaiians who own housing units do not differ significantly from the state's overall patterns of owner-occupied units. However, half of Native Hawaiians rent housing with three or fewer rooms per unit.[127] In addition, nearly 50 percent of Native Hawaiians live in rental units with four or more individuals while more than 50 percent of the state's overall residents live in rental households of two or fewer occupants.[128]

Lower income results in less available funds for living expenses, and thus often less desirable living conditions. The mean value of housing units owned by Native Hawaiians is the lowest of all the major racial/ethnic groups in Hawai'i, and is 22 percent less than the average value of those owned by the overall state population.[129] The average rent paid by Native Hawaiians is also among the lowest in the state, and is only 71 percent of the rental fee paid by Caucasians.[130]

Homelessness also appears to be a prevalent problem in Hawai'i. In 1992, one in 230 state residents was homeless, one in 13 was among the "hidden homeless," i.e., they were sharing accommodations with friends or relatives, and one in four was at risk of becoming homeless.[131] Caucasians are the majority in each of these groups, but Native Hawaiians are the second largest group of the truly homeless.[132]

In short, according to testimony given by Ray Soon, chairman of the Hawaiian Homes Commission, Native Hawaiians suffer the worst housing conditions of any group in Hawai'i. Studies have shown that half of the Hawaiian Home Commission's applicants suffer overcrowding, and one-third pay more than 30 percent of their income for shelter. Overall, 49 percent of Native Hawaiian households experience housing problems, compared with 29 percent of the U.S. population.[133]

Health

Although health is not generally considered a socioeconomic indicator, it does have an effect on one's socioeconomic status and, conversely, socioeconomic status can be linked to health. For example, individuals with lower incomes tend to have higher health risks, including less access to preventive care. Given the low income and education levels of Native Hawaiians, it should not be surprising that many also experience poor health.

Dr. Richard Kekuni Akana Blaisdell, a physician and professor of medicine at the University of Hawai'i,[134] testified that Native Hawaiians have the worst health indicators of all ethnic peoples in Hawai'i. He stated that it has been predicted that by the year 2044 there will be no remaining pure-blooded Kānaka Maoli, as they will be an extinct people. Native Hawaiians have the highest mortality rates for the major causes of death, including heart disease, cancer, stroke, injuries, infections, and diabetes. They also suffer the highest rates for chronic diseases.

The Office of Hawaiian Affairs' *Native Hawaiian Data Book* outlines some specific health conditions. For example, Native Hawaiians are second only to Caucasians in incidences of cancer.[135] Heart disease incidence among Native Hawaiians in the 36–65 age group is 1.3 times that of other racial groups.[136] Also of great concern for both older and younger Native Hawaiians is hypertension.[137] Together, heart disease and cancer account for more than half of the deaths among Native Hawaiians in Hawai'i. Native Hawaiians also account for 73 percent of the deaths of individuals under 18 years old.[138] Diabetes is one of the most common chronic conditions among Native Hawaiians. Hawaiians aged 35 years and older make up 44 percent of all cases of diabetes recorded in the state.[139]

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[124] Ibid., p. 80.

[125] Ibid., "Racial Distribution," p. 92.

[126] Ibid., p. 94.

[127] Ibid., "Housing Profile," p. 110.

[128] Ibid., p. 114.

[129] Ibid., "Economics of Housing," p. 142.

[130] Ibid., p. 148.

[131] Ibid., "The Homeless," p. 130. "At-risk" individuals are defined as those who would be unable to meet shelter payments after missing three or fewer paychecks. Ibid.

[132] Ibid., p. 132.

[133] Soon statement, Forum 2000 Transcript, pp. 160–61.

[134] Dr. Blaisdell is also a member of the board of directors of Ke Ola Mamo, one of five Native Hawaiian health care systems funded by federal monies.

[135] OHA, *Native Hawaiian Data Book–1998*, "Malignant Neoplasms," p. 304.

[136] Ibid., "Circulatory Diseases," p. 314.

[137] Ibid., p. 318.

There are health risks and lifestyle factors that also disproportionately affect the Native Hawaiian community. Native Hawaiians are the racial group with the highest proportion of risk factors leading to illness, disability, and premature death.[140] According to the Hawai'i Department of Health's Behavioral Risk Factor Surveillance System, Native Hawaiians have the highest rate of obesity, twice the rate of the state; Native Hawaiians have higher rates of smoking and alcohol consumption compared with other racial groups; and Native Hawaiians have the highest rate of drinking-and-driving.[141]

The health conditions faced by Native Hawaiians are compounded by the difficulties many face gaining access to available health programs. Statistics show that large segments of the Native Hawaiian population rely on public health care services, an indication that low income is a barrier to full access to health care systems.[142] Another barrier is the ability to obtain culturally relevant care. According to Dr. Blaisdell's testimony:

> Many of our people are very reluctant to enter into the health system because it's a Western system, and so one of the efforts of the Native Hawaiian health care program is to have culturally relevant, culturally competent health care workers, and to have in our system traditional healers as well. So it comes back to revitalizing our culture and incorporating our culture into the modern Western health system.[143]

THE PATH TO RECONCILIATION AND REPARATION

Until we have a deeper factual understanding of how we came to our current plight it will be difficult for us to receive redress due us. Most importantly, only when these wrongs are corrected will our keiki [children] have the opportunity to acquire self-esteem necessary to enjoy the lives they deserve.[144]

The current socioeconomic and health conditions of Native Hawaiians beg intervention and redress. It can be argued that relief will only be achieved through a collaborative effort: a deep commitment to reconciliation on the part of the U.S. government and a strong initiative to develop programs addressing the needs of the Native Hawaiian community on the part of the State of Hawai'i. Remedial attempts have been made in recent years, including the passage of both state and federal legislation; however, the impact of these efforts remains to be seen.

Legislative Attempts

More than 150 federal laws, including the Hawaiian Homes Commission Act and the Admission Act, explicitly acknowledge and describe the unique political relationship between the United States and the Native Hawaiian people.[145] Congress' adoption of the 1993 Apology Resolution reinforced and reaffirmed the federal government's trust obligations to Native Hawaiians. Congress signed this joint resolution "[t]o acknowledge the 100th anniversary of the January 17, 1893, overthrow of the Kingdom of Hawai'i, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawai'i."[146] The act further characterized the overthrow as a violation of international law and acknowledged that the lands were obtained without the consent of or compensation to the people of Hawai'i, resulting in the denial of self-determination. Through the Apology Resolution, Congress and the President committed themselves to reconcile with the native people of Hawai'i.[147]

The notion that the Apology Resolution represents proof that Congress intended to provide redress for the wrongs committed against Native Hawaiians following the overthrow and annexation of their kingdom was echoed at both the 1998 and 2000 Advisory Committee forums. For example, Sherry Broder, attorney for the Office of Hawaiian Affairs, stated that in the Apology Resolution, Congress admitted that the taking of the crown and government lands was without the consent or compensation of the people. It also acknowledged that the overthrow resulted in the suppression of the right to self-determination.[148] Carl Christensen, attorney for the Native Hawaiian Legal Corporation, acknowledged that the Apology Resolution did not create any new federal rights, but asserted that it does serve an important evidentiary purpose as an admission that establishes the background facts upon which litigation may be based.[149]

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[138] Ibid., "Mortality," p. 414.

[139] Ibid., "Diabetes," p. 344.

[140] Ibid., "Summary and Conclusions," p. 457.

[141] Ibid., "Lifestyle and Health Risks," p. 430.

[142] Ibid., "Summary and Conclusions," p. 458.

[143] Blaisdell statement, Forum 2000 Transcript, pp. 62–63.

[144] Blaisdell, "Native Hawaiian 1992," in Dougherty, *To Steal a Kingdom*, p. 183.

[145] Departments of the Interior and Justice, Reconciliation Report, p. 55.

[146] Apology Resolution, S.J. Res. 19, 103d Cong., 1st Sess., Pub. Law. No. 103-150, 107 Stat. 1510 (1993).

[147] Departments of the Interior and Justice, Reconciliation Report, p. 13.

However symbolic, the Apology Resolution does not remedy the effects annexation has had on the people of Hawai'i. Some would argue that the commitment to reconcile with Native Hawaiians must be reinforced through real actions on the part of the federal government. The following discussion highlights the promises and shortcomings of the Apology Resolution as expressed in the Advisory Committee's 1998 community forum.

Analyzing the Apology Resolution

Concern about the apparent failure to implement concrete reconciliation efforts in the five years after adoption of the Apology Resolution led the Hawaii Advisory Committee to conduct its August 22, 1998, community forum.[150] The session gathered information on actions taken since the Apology Resolution was signed into law on November 23, 1993, to provide a foundation for and to support reconciliation efforts between the United States and Native Hawaiians.

The Advisory Committee began its 1998 community forum with an opening chant, or 'oli, consistent with traditional Native Hawaiian protocol. The 'oli provided important historical background, welcomed the participants, and encouraged thoughtful exchange and sharing of information.

The first panel of speakers addressed the purpose and meanings of the Apology Resolution. Esther Kia'aina, representing the act's primary sponsor, U.S. Senator Daniel K. Akaka, explained that apology resolutions were introduced in different forms four times during the 101st, 102nd, and 103rd Congresses.[151] Although some suggest this "was essentially a cynical action by an uninterested Congress,"[152] the facts suggest otherwise. Concerns in the Senate about the implications of the proposed resolution forced a roll call vote, which was decided in favor of passage by a 65 to 34 margin.[153]

In the final analysis, the Apology Resolution is a "necessary step" in "an evolving and continuing process whereby the federal government can make amends for some of its past wrongs."[154] Two of the measure's underlying goals are to (1) educate the American public and the Congress on the history of U.S. involvement in the overthrow and its aftermath; and (2) set the record straight regarding the 1983 Native Hawaiians Study Commission's (NHSC) majority report, which concluded that the U.S. government was not liable for the loss of sovereignty of lands of the Hawaiian people in the 1893 overthrow.[155] Attorney James Mee, who expressed concerns about specific findings and further reservations regarding implementation of the Apology Resolution, nevertheless acknowledged that the resolution's opponents in the U.S. Senate did not challenge its intended result of correcting inaccuracies contained in the NHSC's majority report.[156]

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[148] Sherry Broder statement, Forum 2000 Transcript, p. 153.

[149] Carl C. Christensen statement, Forum 1998 Transcript, vol. 1, pp. 72–73. *See also* ibid., pp. 68–69.

[150] *See* Forum 1998 Transcript, vols. 1 and 2.

[151] Esther Kia'aina statement, Forum 1998 Transcript, vol. 1, pp. 13–17.

[152] John Goemans statement, Forum 1998 Transcript, vol. 1, p. 92 (quoting Samuel King, senior judge, U.S. District Court for the District of Hawai'i, and son of a former Hawai'i governor).

[153] Kia'aina statement, Forum 1998 Transcript, vol. 1, p. 17; *see also* 103 CONG. REC. 14482 (1993).

[154] Kia'aina statement, Forum 1998 Transcript, vol. 1, p. 18 (summarizing Senator Akaka's views).

[155] Ibid., pp. 15, 19.

[156] James Mee statement, Forum 1998 Transcript, vol. 1, p. 50 (responding that Senators Slade Gorton and George Brown "apparently admitted that they did not dispute or were not aware of anything to contradict the facts"). Senator Akaka's legislative aide observed that if the senators wanted to challenge the findings in this Apology Resolution, "they should have held the bill and requested that it not be voted upon." Kia'aina statement, Forum 1998 Transcript, vol. 1, p. 57. Mee's primary concern was as follows: that the Apology Resolution was not intended to create any legal rights, much less serve as an admission that Hawaii's position as a state was in question. Mee statement, Forum 1998 Transcript, vol. 1, pp. 45–46 (noting lawsuits relying, in part, on the Apology Resolution in arguing that Hawai'i was illegally annexed). Second, Mee claims the finding that the ceded lands were acquired by the United States without payment

The NHSC was created by Congress less than a month before President Ronald Reagan entered office.[157] Kina'u Boyd Kamali'i, chairperson of the NHSC and author of its minority report (joined by the two other commissioners from Hawai'i), testified as a kupuna on September 28, 2000, that the commission was "dead before we started."[158] The minority report explains that an official in the administration of newly installed President Reagan labeled the study a "boondoggle."[159] President Jimmy Carter's initial appointees were dismissed, and it appeared that the study would not take place. However, Kamali'i (then the minority leader of the State House of Representatives and former chairperson of the Reagan campaign in Hawai'i) was able to persuade the administration to implement the NHSC's mandate. According to the minority report, however, the six "Mainland Commissioners" who authored the majority report "lack[ed] . . . serious intent" as demonstrated by a flawed methodology that failed to consider available primary sources.[160]

Lingering Effects of the Overthrow, Rooted in Historical Federal Ambivalence

The Native Hawaiians Study Commission's experience is not an isolated example of the historically shifting political winds that have characterized the relationship between Native Hawaiians and the United States.[161] One of the recurring themes at the Hawaii Advisory Committee's 1998 community forum was the adverse impact of these shifting attitudes upon Native Hawaiians.

The awkward transition between the Carter and Reagan administrations described in the preceding section is rooted in the ambivalence that characterized the Harrison-Cleveland-McKinley transitions discussed earlier in this report. Several speakers referred to the shifting federal policy toward Native Hawaiians at the end of the 20th century. Mililani Trask, a Native Hawaiian attorney and at that time Kia'āina (governor) of Ka Lāhui Hawai'i, suggested that the administrative confusion is best illustrated through the history of opinions issued by the Department of the Interior.[162]

The first such opinion, drafted under the Carter administration on August 27, 1979, in response to an inquiry by the Hawaii Advisory Committee, acknowledged the existence of a trust relationship between the federal government and Native Hawaiians.[163] Ten years later, the department stated that its earlier opinion was not correct and, the following year, expressly "disclaimed any trusteeship role" in a letter to U.S. Commission on Civil Rights Chairman Arthur Fletcher.[164] On January 19,

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of compensation to the Hawaiian people is inaccurate. Ibid., pp. 47–48.

[157] Native Hawaiians Study Commission Act of 1980, Pub. L. No. 96-565, tit. III, §§ 301–307, 94 Stat. 3321 (1980).

[158] Kina'u Boyd Kamali'i, statement before the Hawaii Advisory Committee to the U.S. Commission on Civil Rights, meeting of Sept. 28, 2000, as recorded in notes taken by David M. Forman, acting chairperson (hereafter cited as Kūpuna Forum).

[159] Native Hawaiians Study Commission, *Report on the Culture, Needs and Concerns of Native Hawaiians*, vol. II (June 23, 1983), p. iv.

[160] NHSC report, vol. II, p. iv; Kamali'i statement, Kūpuna Forum.

[161] The twists and turns of the relationship between Native Hawaiians and the State of Hawai'i similarly reveal a disconcerting history of "broken promises" with respect to efforts to redress past wrongs. For example, in 1991, the state gave Native Hawaiians the right to sue the state for mismanagement of Hawaiian homelands provided they appear first before a claims review panel. The panel awarded millions of dollars in damages to thousands of Native Hawaiian claimants, subject to approval by the legislature. At that point, the legislature violated the claimants' rights to due process by changing the rules midstream. When the legislature failed to act on the panel awards, the claimants were unable to file suit in the courts. Pat Omandam, "Hawaiians seek to sue state over land disputes," *The Honolulu Star-Bulletin*, June 8, 2000, accessed at <http://star-bulletin.com/2000/06/09/news/story2.html>.

[162] Mililani Trask statement, Forum 1998 Transcript, vol. 1, p. 120; Kia'aina statement, Forum 1998 Transcript, vol. 1, p. 19 (mentioning the department's "flip flop and denial" in subsequent years).

[163] Kia'aina statement, Forum 1998 Transcript, vol. 1, p. 20; Frederick N. Ferguson, deputy solicitor general, U.S. Department of the Interior, letter to Philip Montez, regional director, U.S. Commission on Civil Rights, Aug. 27, 1979, published in Hawaii Advisory Committee, *Breach of Trust*. *See also* Hawaii Advisory Committee, *A Broken Trust*, p. 9, footnote 10; ibid., p. 9, footnote 11 (quoting a letter from James W. Moorman of the U.S. Department of Justice, which states that "individual beneficiaries of the trust may also file suit").

[164] Timothy Glidden, counselor to the Secretary and Secretary's designated officer, U.S. Department of the Interior, HHCA, letter to Daniel K. Inouye, chairman, Senate Select Committee on Indian Affairs, Oct. 17, 1989, quoted in Hawaii Advisory Committee, *A Broken Trust*, pp. 9–10, footnote 13. Glidden letter to Arthur A. Fletcher, chairman, U.S. Commission on Civil Rights, July 17, 1990, quoted in Hawaii Advisory Committee, *A Broken Trust*, pp. 9, 55–57, footnote 12 (appendix D). *See also* Hawaii Advisory Committee, *A*

1993, during the final days of President George H.W. Bush's administration, the department issued the so-called "Sansonetti opinion" (which is based in large part upon the now-discredited NHSC majority report), concluding that the federal government had no trust responsibility to Native Hawaiians either before statehood or thereafter.[165] On November 15, 1993, the administration of President William Jefferson Clinton issued the so-called "Leshy opinion" withdrawing the Sansonetti opinion, but declining to bring legal action to enforce provisions of federal statutes providing entitlements for Native Hawaiians.[166]

Community leaders appearing before the Advisory Committee painted a grim picture of the educational, health, and social status of Native Hawaiians, asserting that these problems are a major consequence of the "illegal overthrow" of their monarchy and the loss of sovereignty. Dr. Richard Kekuni Blaisdell opined that it is the impact of colonization by foreign settlers on indigenous people that explains why social, health, and economic statistics are worse for Kānaka Maoli than for all other ethnic peoples in Hawai'i.[167] Therefore, the distinction between non-Native Hawaiians and Kānaka Maoli under the Apology Resolution is not only justified, but is "essential."[168] The chairperson of the Office of Hawaiian Affairs, A. Frenchy DeSoto, agreed, emphasizing that "this isn't a racial issue. . . . They have taken my dignity. They have stripped me of my nationhood, my language, everything."[169]

Kina'u Kamali'i reiterated that the NHSC's findings regarding the economic, educational, and health needs of Native Hawaiians were unanimous.[170] Mililani Trask referred to the Urban Institute report of 1996, which shows that Native Hawaiians have the poorest housing conditions in the United States.[171] DeSoto later urged the Advisory Committee to compare the NHSC's findings with the 1998 *Native Hawaiian Data Book*, which reveals "virtually no improvement in the statistics on Hawaiians. . . ."[172] When asked how Native Hawaiians could be made healthy again, Dr. Blaisdell referred to the opening chant (conducted by Keali'i Gora, Lilikalā Kame'eleihiwa, and Kanalu Young)—which invoked lessons derived from the Kumulipo[173]—and explained: "We come from the land. Our land has been taken from us. Without our land we are not a people. Return our land, and we will be a whole people again."[174]

Defining the Parameters of Reconciliation

Participants in both Advisory Committee forums alleged that the question of political status for Native Hawaiians has proven to be a stumbling block for redress of community concerns. Other presenters suggested that the picture is further clouded by constitutional and legal constraints that have been applied to prevent Native Hawaiians from seeking judicial remedies. John Goemans, the attorney who represented the plaintiff in *Rice v. Cayetano*, opined that "it seems clear to me that if you are talking about an Apology Resolution, and the issue of reconciliation is the end product of that resolution, you are talking about an Apology Resolution

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Broken Trust, pp. 10, 53–54, footnote 14 (appendix C), quoting a letter from Myles E. Flint of the U.S. Department of Justice, which states "the Justice Department does not oversee the trust")

[165] Trask statement, Forum 1998 Transcript, vol. 1 p. 120. Kia'aina statement, Forum 1998 Transcript, vol. 1, p. 19; Memorandum (M-36978), Jan. 19, 1993, from Thomas L. Sansmetti, solicitor, U.S. Department of the Interior, to the counselor to the Secretary and the Secretary's designated officer, Hawaiian Homes Commission Act, 100 Interior Dec. 431, 1993 WL 732535 (DOI).

[166] U.S. Department of the Interior, Office of the Solicitor, Statement of Solicitor John D. Leshy, Nov. 15, 1993. Trask statement, Forum 1998 Transcript, vol. 1, p. 121. *See also* Kia'aina statement, Forum 1998 Transcript, vol. 1, p. 20 (citing pending litigation); Han v. United States, 45 F.3d 333, 337 n.3 (9th Cir. 1995) (concluding the United States does not have a general fiduciary obligation to bring suit against the state for any particular breach of trust, because the Department of the Interior did not have the kind of "pervasive role" in the management of trust lands that was involved in United States v. Mitchell, 463 U.S. 206 (1983)).

[167] Blaisdell statement, Forum 1998 Transcript, vol. 1, pp. 64–65.

[168] Ibid., p. 64.

[169] A. Frenchy DeSoto statement, Forum 1998 Transcript, vol. 2, p. 202.

[170] Kamali'i statement, Forum 1998 Transcript, vol. 2, p. 272.

[171] Trask statement, Forum 1998 Transcript, vol. 1, pp. 122–23.

[172] DeSoto statement, Forum 1998 Transcript, vol. 2, p. 174.

[173] *See* pp. 2–3 above for a discussion of the Kumulipo.

[174] Blaisdell statement, Forum 1998 Transcript, vol. 1, p. 65. *See also* Patterson statement, Forum 1998 Transcript, vol. 1, p. 36 (noting the spiritual yearning of Native Hawaiians to reconnect with the land and suggesting that the failure to respond constitutes religious discrimination).

that is extended to only a certain small segment—relatively small segment of the population of the Kingdom of Hawaii."[175] Native Hawaiian attorney Pōkā Laenui made a similar point, though in a more complex fashion and with an apparently different intent:

> One of the major failings of the United States is its twisting the issue of Hawaiian sovereignty from a national to a racial question. The Congress has taken the act of overthrowing the government of an independent nation-state, and suggests reconciliation only to the Native Hawaiian people. . . . One of the reasons for this problem in American distinction is a strong indigenous movement occurring here, and in America, and in the rest of the world. . . . Many people, including Native Hawaiians, have not understood the distinction, and speak of indigenous rights and Hawaiian sovereignty as if they are one and the same. They are not the same. But they are not a matter of either/or as well. It is not a question of choosing in favor of Native Hawaiian rights or Hawaiian sovereignty. Both rights should be available.[176]

Professor Kanalu Young also acknowledged the multiracial aspects of the Hawaiian Kingdom, offering that the issue "needs to be reconsidered and worked into the mix . . . [b]ut it is something that will be done in the future. . ."[177] According to Professor Young, the reconciliation process should not be "at the exclusion of other people living in these islands," but Native Hawaiians need to take the lead.[178]

In a written statement provided to the Advisory Committee at the 2000 forum, Senator Daniel Akaka stated:

> The process of reconciliation is a process of healing, which should not be viewed as one particular issue or a narrowly defined process. It should be viewed as a multitude of positive steps between Native Hawaiians and the federal government to improve the understanding between each party, to improve the social and economic conditions of Native Hawaiians, and to resolve long standing matters of political status and land claims.[179]

Senator Akaka's representative explained further that the process of reconciliation, or ho'oponopono,[180] should not be defined by the federal government unilaterally, but instead developed mutually with Native Hawaiians.[181] Several other presenters stressed the need for reconciliation to take place in the communities of Hawai'i.[182] Mililani Trask added that the U.S. attorney general should hold a "listening conference" in Hawaii analogous to those held with Native Americans.[183]

Reverend Kaleo Patterson provided an example of a largely successful process of apology and redress. He commended the efforts of Asian American churches in Hawai'i, for example, who provided leadership in pushing for an apology by local churches for their complicity in the overthrow and also provided Native Hawaiians with a $3 million redress package.[184] Rev. Patterson noted that two-thirds of Native Hawaiians left their churches after the overthrow.[185] Attorney

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[175] Goemans statement, Forum 1998 Transcript, vol. 1, p. 106. *See also* Stuart Minor Benjamin statement, Forum 1998 Transcript, vol. 1, p. 151.

[176] Pōkā Laenui statement, Forum 1998 Transcript, vol. 1, pp. 80–82.

[177] Kanalu Young statement, Forum 1998 Transcript, vol. 1, p. 96.

[178] Ibid., p. 95.

[179] Senator Daniel Akaka, written statement to the Hawaii Advisory Committee to the U.S. Commission on Civil Rights, re: "The Impact of the Decision in *Rice v. Cayetano* on Entitlements," community forum, Honolulu, HI, Sept. 29, 2000, p. 2 (hereafter cited as Akaka written statement).

[180] *See generally* E. Victoria Shook, *Ho'oponopono: Contemporary Uses of a Hawaiian Problem-Solving Process* (Honolulu, HI: East-West Center, 1985). Ho'oponopono means "(a) To put to rights; to put in order or shape, correct . . ." and "(b) Mental cleansing: family conferences in which relationships were set right . . . through prayer, discussion, confession, repentance, and mutual restitution and forgiveness." Pukui and Elbert, *Hawaiian Dictionary*, p. 341.

[181] Kia'aina statement, Forum 1998 Transcript, vol. 1, p. 21.

[182] Rev. Kaleo Patterson statement, Forum 1998 Transcript, vol. 1, p. 34; Van Dyke statement, Forum 1998 Transcript, vol. 1, p. 163. Professor Stuart Minor Benjamin also agreed that "people in the state should take the lead in determining what they want." Benjamin statement, Forum 1998 Transcript, vol. 1, p. 143.

[183] Trask statement, Forum 1998 Transcript, vol. 1, p. 126. Trask also noted that the Native Hawaiian sovereignty initiative known as Ka Lāhui Hawai'i has developed a comprehensive proposal to implement reconciliation, which she attached as exhibit F to her written submission. Ibid., pp. 124–25.

[184] Patterson statement, Forum 1998 Transcript, vol. 1, pp. 22–29. *See also* Eric K. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post Civil Rights America* (New York and London: New York University Press, 1999), pp. 60–78.

[185] Patterson statement, Forum 1998 Transcript, vol. 1, p. 37.

James Mee provided some support for this observation when he stated that his family belonged to the church Queen Lili'uokalani joined upon leaving her former place of worship in the aftermath of the overthrow.[186]

Rev. Patterson described the process within the church as a "decolonization of the soul."[187] However, he lamented the enormous task of educating American churches that "don't even understand what is going on in Indian country, much less jump to Hawai'i now, and deal with Don Ho and Magnum PI and all that. . . ."[188]

Attorney Mee, who described himself as "part Hawaiian" with "a lot of haole in me," pointed out that "during the overthrow and after, there was a lot of division among people in Hawai'i."[189] He observed that the Liberal Party, which was composed primarily of Native Hawaiians, actually called for the establishment of a republic rather than a monarchy.[190] Nevertheless, as Mee acknowledged, (1) the Liberal Party's concern related in part to its unhappiness with the Reform/Missionary Party that was in control of the government at that time, and (2) some members of the Liberal Party changed their positions after the overthrow.[191] Danny Aranza, deputy director of the Office of Insular Affairs at the Department of the Interior, effectively placed these divisions in their proper context (although his comments were actually directed toward current factions within the Native Hawaiian community):

> I know that there are as many formulations of these concepts [i.e., self-government, self-determination, decolonization, and sovereignty] as there are fish in the sea. And while people may see that as a weakness, I think that whatever our conception is of Native Hawaiian political status, I think one of the strengths of these movements right now is, paradoxically, the diversity of opinion and perspective. What I mean is this: That from so many opinions and perspectives regarding political status, all are united in the common objective, that something must be done—something must be done to address the political, social, economic, and historical situation of the Kānaka Maoli.[192]

Professor Jon Van Dyke underscored the urgency of reconciliation by warning that the Native Hawaiian culture will be lost if Native Hawaiians are not allowed to have a separate and distinct status.[193]

Programs Serving Native Hawaiians, One Component of Reconciliation

During the Advisory Committee's 2000 forum, panelists confirmed that, despite facing socioeconomic disadvantage, Native Hawaiians have maintained a distinct community,[194] partly through the availability of federal and state programs designed to better the conditions of Native Hawaiians. These governmental services include health care, educational programs, employment and training programs, children's services, conservation programs, fish and wildlife protection, agricultural programs, and native language immersion programs.[195]

Recognizing the unique political, cultural, and socioeconomic position of Native Hawaiians, the State of Hawai'i has developed several programs for their benefit.[196] In particular, the Office of Hawaiian Affairs has been the main avenue for the State of Hawai'i to meet the needs of the Native Hawaiian community.

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[186] Mee statement, Forum 1998 Transcript, vol. 1, p. 44.

[187] Patterson statement, Forum 1998 Transcript, vol. 1, p. 37.

[188] Ibid., p. 39.

[189] Mee statement, Forum 1998 Transcript, vol. 1, p. 43. *See also* ibid., pp. 44–45 ("there are many other people in Hawai'i that were affected, and even today, are potentially affected by what can happen in the whole process of reconciliation").

[190] Ibid., p. 50.

[191] Ibid.

[192] Ferdinand "Danny" Aranza statement, Forum 1998 Transcript, vol. 2, p. 220. In any event, there are indications that Native Hawaiians can and have reached consensus to a certain degree on issues relating to sovereignty and self-determination. Kamali'i statement, Forum 1998 Transcript, vol. 2, pp. 275–76 (citing the Palapala 'Aelike, or document of agreements, which was developed by more than 1,000 individuals and representatives of Native Hawaiian organizations, through an 18-month process that preceded the Advisory Committee's 1998 forum).

[193] Jon M. Van Dyke statement, Forum 1998 Transcript, vol. 1, p. 130.

[194] Departments of the Interior and Justice, Reconciliation Report, pp. 46–51; Brief of *Amici Curiae* State Council of Hawaiian Homestead Associations, Hui Kāko'o 'Āina Ho'opulapula, Kalama'ula Homestead Association and Hawaiian Homes Commission in Support of Respondent, *Rice v. Cayetano*, No. 98-818 (filed July 28, 1999), at 21–29, accessed at <http://www.nativehawaiians.com/documents/homestd_brief.pdf> and also available via <http://www.nativehawaiians.com/documents/homestd_brief.rtf>.

[195] Recognition Legislation, S. 2899, 106th Cong., 2d Sess., § 1(13) (2000). *See also* Recognition Legislation, S. 81, 107th Cong., 1st Sess., § 1(16) (2001); Recognition Legislation, S. 746, 107th Cong., 1st Sess., § 1(16) (2001).

[196] Van Dyke, "The Political Status of the Native Hawaiian People," p. 108.

The Office of Hawaiian Affairs (OHA) was created by an amendment to the Hawai'i State Constitution in 1978 to address the issues and concerns of Native Hawaiians—a people who were, and by many accounts still are, suffering from discriminatory practices and undesirable living conditions. The stated mission of OHA is to "strengthen and maintain the Hawaiian people and their culture as powerful and vital components in society."[197] Based on the intent to empower Native Hawaiians in their desire to develop self-sufficiency and control their own destiny, OHA was designed to be a native-controlled entity. This meant that its beneficiaries and trustees would be Native Hawaiians, and its nine trustees would be elected by Native Hawaiians.[198] Today, OHA controls more than half a billion dollars in assets from the Ceded Lands Trust and spends millions of dollars annually on programs addressing the social, economic, and cultural needs of Native Hawaiians.[199]

Another important state agency addressing the needs of Native Hawaiians is the Hawaiian Homes Commission (HHC), which was established by Congress in 1921 pursuant to the Hawaiian Homes Commission Act.[200] The legislation established a land trust of approximately 203,000 acres for homesteading by Native Hawaiians and created the HHC to govern these lands.[201] The purpose of the act, and the mission of HHC, is to place Hawaiians on the land, thereby fostering the self-sufficiency and native culture of Hawaiians. However, a 1991 Hawaii Advisory Committee report found that the HHC had essentially failed to fulfill its mandate, with both state and federal governments responsible for the agency's inadequacy.[202] In recent years, though, the HHC has made progress in recovering lands and making them available for homesteading.[203]

Ray Soon, chairman of the Hawaiian Homes Commission, believes that despite the grim housing statistics facing Native Hawaiians, which have persisted for many decades, the tide is changing. He noted at the 2000 forum:

> I can only speak for the Hawaiian Homes Program, but I can feel the shift in other programs throughout the community. . . . I think you will find some of the same optimism for the impact of our programs in the community.[204]

According to Mr. Soon, in the past 10 years HHC has produced more homesteads than in the first 70 years of the program. Just fewer than 1,000 homesteads are currently in production and another 1,000 are in the design phase. HHC is experimenting with several types of homes, including farms, ranches, multifamily dwellings, and turn-key homes. It is also expanding into underserved markets, recently breaking ground on its first elderly project and its first rent-to-own project.

The potential benefits of these and other programs serving Native Hawaiians outweigh the costs of their operational support, according to many of the panelists who spoke at the 2000 forum. Tara Lulani Mckenzie, president and chief executive officer of Alu Like, Inc., stated that organizations such as hers have had many positive outcomes over the past few years. For example, a higher percentage of Native Hawaiians are employed; more Native Hawaiians are attending college; there is a greater appreciation of Native Hawaiian culture and traditions; and Native Hawaiian language opportunities have increased. She told the Advisory Committee:

> Every time a Hawaiian family is able to move into a home on Hawaiian homelands, health prevention services help a high-risk Hawaiian, prenatal and early childhood education assists a teenage mother to better care for her child, a Hawaiian student graduates from college, an adult masters new skills in a job, or one of our own overcomes substance abuse, we know that one more Native Hawaiian individual or family has been helped

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[197] OHA, *Native Hawaiian Data Book–1998*, p. iii.

[198] HAW. CONST. art. XII, § 5.

[199] Hawaii Advisory Committee, *A Broken Trust*, p. 1. *See generally* Office of Hawaiian Affairs, *Fiscal Annual Report 1999*, "Financial Statements for the Years Ended June 30, 1999 and 1998, Supplemental Schedule for the Year Ended June 30, 1999 and Independent Auditors' Report."

[200] Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921).

[201] *See* State of Hawai'i, Department of Hawaiian Home Lands, accessed at <http://www.hawaii.gov/dhhl/about.htm>.

[202] *See generally* Hawaii Advisory Committee, *A Broken Trust*.

[203] Departments of the Interior and Justice, Reconciliation Report, pp. 34–35.

[204] Soon statement, Forum 2000 Transcript, pp. 161–62.

> and healed. That's one less needing assistance. Every accomplishment helps in this arena.
>
> And while the above-mentioned improvements and examples of effective programs are encouraging achievements, unfortunately, Native Hawaiians still have some of the worst statistics. . . . Alcoholism, substance abuse, domestic violence, poor health habits, lack of motivation, sedentary lifestyle, are still very critical problems in the Native Hawaiian communities.[205]

Ms. Mckenzie added:

> When people have greater control over their destiny and are more self-sufficient, they feel a sense of self-worth and pride, a sense of value in their lives. Nothing is more powerful than this to help mend broken hearts and change lives.[206]

Other panelists also expressed the importance of these federal and state programs for the benefit of Native Hawaiians. According to Mahealani Kamau'u, executive director of the Native Hawaiian Legal Corporation, it has only been in the past 25 years that Native Hawaiians have "had a modicum of political empowerment and been able to exercise direct responsibility for their own affairs, that progress has been made in so many areas."[207] She added that the modest progress made in combating the socioeconomic problems of Native Hawaiians can be attributed to reforms implemented at the Department of Hawaiian Home Lands, the creation of the Office of Hawaiian Affairs, and federal programs designed to address housing, health, employment, and cultural needs.[208]

Despite all their potential benefits, many programs designed to benefit Native Hawaiians have been criticized, by both policy experts and Native Hawaiians themselves, as inefficient and poorly managed. Many people in need of assistance never receive it. Several government reports, including an evaluation of the Hawaiian Homelands Program by the Commission's Hawaii Advisory Committee, have documented the shortfalls of many of these programs.[209] The federal and state governments eventually began appropriating the financial resources necessary to carry out their trust responsibilities. However, the resulting improvement in the conditions of Native Hawaiians was accompanied by vocal opposition from persons challenging the lawfulness of these expenditures. Some believe these programs should be available to all persons in need—not just Native Hawaiians. It is precisely out of such reasoning that recent legal challenges to Native Hawaiian entitlement programs have arisen, the most visible of which is the Supreme Court's decision in *Rice v. Cayetano*.

RECONCILIATION AT A CROSSROADS: IMPLICATIONS OF THE *RICE* DECISION

Contrary to what some commentators would have us believe, less for Hawaiians does not mean more for non-Hawaiians. We all benefit from living in a just society. Here in Hawai'i, we cannot build a just society without justice for Hawaiians.[210]

The path to reconciliation, however modest, that had begun with the establishment of federal and state programs for the benefit of Native Hawaiians and the Apology Resolution is now coming under legal and political attack. In a split decision on February 23, 2000, the Supreme Court ruled in *Rice v. Cayetano*[211] that Hawaiian-only voting for trustees of the state-created Office of Hawaiian Affairs violated the 15th Amendment of the Constitution, which prohibits race-based exclusion from voting.

Setting the Stage for the *Rice* Case

To capture the importance of the *Rice v. Cayetano*[212] decision, it is necessary to briefly review Hawaii's legislative history. Initially, ownership of the Hawaiian islands was transferred (or ceded) to the United States "for the benefit of the inhabitants of the Hawaiian Islands," under the Newlands Resolution of 1898.[213] In 1921, the U.S. Congress enacted the Hawaiian Homes Commission Act (HHCA), which earmarked approximately 200,000 acres of public lands, established loan programs, and authorized homesteading leases for the benefit of "native Hawaiians."[214]

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[205] Tara Lulani Mckenzie statement, Forum 2000 Transcript, p. 43.

[206] Ibid., p. 45.

[207] Mahealani Kamau'u statement, Forum 2000 Transcript, p. 85.

[208] Ibid.

[209] *See, e.g.*, Hawaii Advisory Committee, *A Broken Trust*.

[210] Bill Hoshijo statement, Forum 2000 Transcript, p. 94.

[211] 120 S. Ct. 1044 (2000).

[212] 941 F. Supp. 1529 (D. Haw. 1996), *partial summary judgments denied and granted by* 963 F. Supp. 1547 (D. Haw. 1997), *aff'd*, 146 F.3d 1075 (9th Cir. Haw. 1998), *cert. granted*, 526 U.S. 1016 (1999), *rev'd*, 120 S. Ct. 1044 (2000). On remand from the Supreme Court, the court of appeals vacated its earlier decision, reversed the district court, and remanded the case for further proceedings. *Rice v. Cayetano*, 208 F.3d 1102 (9th Cir. 2000). The district court subsequently entered judgment, consistent with a stipulation between the parties, declaring that the plaintiff's 15th Amendment right to vote had been violated. *See Rice v. Cayetano*, Civ. No. 96-00390-DAE (D. Haw. Apr. 11, 2000).

Subsequently, when Hawai'i was admitted as a state in 1959, the United States granted to the state, in trust, whatever title it held to most of the public property of the Hawaiian islands.[215] Concomitantly, Hawai'i consented to incorporate the HHCA in its constitution.[216] This transfer of land ownership to the State of Hawai'i mandated that the income generated from the Ceded Lands Trust would be held as a "public trust" for the following purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.[217]

In the 1960s and 1970s, enclaves of Native Hawaiians began to kū'ē, to resist, displacement from their lands.[218] Despite, or perhaps because of, the numerous evictions that took place, the protesters were able to raise the consciousness of Hawaii's residents with respect to their claims for justice.[219] A 1978 amendment to Hawaii's constitution subsequently created the Office of Hawaiian Affairs (OHA) to improve the well-being of Native Hawaiians and Hawaiians.[220] OHA was also authorized to administer 20 percent of the earnings from the public lands ceded to the State of Hawai'i pursuant to the 1959 Admission Act.[221] Moreover, the nine members of OHA's board of trustees must be elected by voters who are legally defined as "Hawaiians."[222]

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[213] Joint Resolution Annexing Hawaii to the United States (Newlands Resolution), J. Res. 55, 55th Cong. (1898). *See also* "The History of OHA," accessed at <http://www.planet-hawaii.com/oha/topnav.html>; Message of the President to the Senate and House of Representatives, *reprinted in* H.R. REP. NO. 53-243 at 3–17 (1893). The Hawaiian islands consist of approximately 4 million acres, of which 1.8 million acres were originally crown and government lands (formerly held in trust by Queen Lili'uokalani and the government of the independent Kingdom of Hawaii) and now referred to as the ceded lands. Some of these lands have been withheld by the federal government, transferred to private ownership, or disposed of in other ways. Thus, the State of Hawai'i currently administers approximately 1.2 million acres of the ceded lands trust.

[214] Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921). This act was, in part, a response to the concern that the number of persons with "full Hawaiian blood" was rapidly decreasing, and they would soon become a minority group in Hawai'i. *Id.* H.R. REP. NO. 839, 66th Cong., 2d Sess. 4 (1920). The HHCA was also enacted to redress a historically inequitable distribution of land, wherein the one-third interest of the common people was ignored and presumably reverted to the crown in trust, then taken by the United States upon annexation. *See id.* at 5.

The definition of "native Hawaiians" was "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian islands *previous* to 1778." HHCA, § 201(a)(7) (emphasis added). *See also* Lesley Karen Friedman, "Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts," *Hawaii Law Review*, vol. 14 (1992), p. 536 (citing H.R. REP. NO. 839, 66th Cong., 2d Sess. 4 (1920)). Senator John H. Wise, a member of the "Legislative Commission of the Territory [of Hawai'i]" and an author of the HHCA, stated the purpose of the act was to "rehabilitate" the Native Hawaiian people on their own homelands. "The Hawaiian people are a farming people and fishermen, out of door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now the only way to save [them] . . . is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them." Ibid.

[215] Admission Act of 1959, Pub. L. No. 86-3, §§ 4–7, 73 Stat. 4, 5, 7.

[216] HAW. CONST. art. XII, §§ 1–3.

[217] Admission Act of 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6.

[218] Patterson statement, Forum 1998 Transcript, vol. 1, p. 36; Blaisdell statement, Forum 1998 Transcript, vol. 1, pp. 58–59.

[219] Ibid.

[220] HAW. REV. STAT. § 10-3 (1993). *See* HAW. CONST. art. XII, § 5. OHA has a nine-member board of trustees, who must be Hawaiians. *See also* HAW. REV. STAT. § 13D-1 (1993). A "Hawaiian" is "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.*

[221] HAW. REV. STAT. § 10-13.5 (1993). The State of Hawai'i created OHA as a method of fulfilling the trust obligation it accepted from the federal government. Hawaii's legislature also funds OHA.

[222] HAW. CONST. art. XII, § 5.

This particular requirement ultimately became a major point of contention in the *Rice* case. It was another vote, described in the following section, that prompted the initial legal challenges.

The Native Hawaiian Vote

In 1993, the legislature of the State of Hawai'i adopted Act 359 "to acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing."[223] This act, which eventually led to the "Native Hawaiian Vote," created a Hawaiian Sovereignty Advisory Committee designed to provide the legislature with guidance on:

> (1) Conducting special elections related to this Act; (2) Apportioning voting districts; (3) Establishing the eligibility of convention delegates; (4) Conducting educational activities for Hawaiian voters, a voter registration drive, and research activities in preparation for the convention; (5) Establishing the size and composition of the convention delegation; and (6) Establishing the dates for the special election.[224]

In 1994, Act 200 amended Act 359 by establishing the Hawai'i Sovereignty Elections Council (HSEC).[225] HSEC was required to "[h]old a plebiscite in 1995, to determine the will of the indigenous Hawaiian people to restore a nation of their own choosing" and, "[s]hould the plebiscite be approved by a majority of qualified voters, provide for a fair and impartial process to resolve the issues relating to form, structure, and status of a Hawaiian nation."[226] The legislature postponed the 1995 special election and, under Act 140, called instead for a "Native Hawaiian Vote in 1996."[227] Act 140 adopted HSEC's Hawaiian Sovereignty Election Guidelines and Procedures for the Native Hawaiian Vote ("Election Guidelines"). Eligible voters in the Native Hawaiian Vote were required to be Hawaiian and at least 18 years old by September 2, 1996.[228]

The question posed in the Native Hawaiian Vote was, "Shall the Hawaiian people elect delegates to propose a Native Hawaiian government?"[229] More than 70 percent of eligible ballots responded 'ae, or yes.[230] Pursuant to statute, the HSEC dissolved as of December 31, 1996, but its work was carried on by a nonprofit organization named Hā Hawai'i.[231] As Hā Hawai'i proceeded with the plan to elect delegates, controversies emerged with respect to (1) allegations of state involvement in what was supposed to be an independent initiative; and (2) the fact that Act 200, § 14 provided that state laws, ordinances, regulations, and constitutional provisions would not automatically be changed as a result of these efforts.[232] Nevertheless, the election of 85 delegates took place on January 17, 1999; the convention subsequently commenced on July 31, 1999; and two proposed constitutions eventually were developed—one providing for Independence, and the other establishing an Integrated/Nation-Within-a-Nation framework.[233]

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[223] *See* 1993 Haw. Sess. Laws, Act 359, *amended by* 1994 Haw. Sess. Laws, Act 200, *amended by* 1996 Haw. Sess. Laws, Act 140. "The purpose of this Act is to acknowledge and recognize the unique status that the Native Hawaiian people bear to the State of Hawaii and to the United States and *to facilitate the efforts of Native Hawaiians to determine self-governance of their own choosing*." 1996 Haw. Sess. Laws, Act 140, § 2 (emphasis added).

[224] 1993 Haw. Sess. Laws, Act 359 § 4(b). The Admission Act established an agreement between the United States and the State of Hawai'i, in which the federal government transferred land ownership to Hawai'i to hold in public trust for the people of Hawai'i. A portion of the proceeds of the trust lands are to be employed for the "betterment of the conditions of native Hawaiians." Admission Act of 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4.

[225] 1994 Haw. Sess. Laws, Act 200, § 6.

[226] *Id.* The act then gave the HSEC the authority to plan a convention of delegates based on a positive response from a majority of ballots cast, instead of a majority of qualified voters. *Id.*

[227] 1996 Haw. Sess. Laws, Act 140.

[228] *Rice*, 941 F. Supp. at 1529. Native Hawaiians were permitted to register and cast ballots in the Native Hawaiian Vote. *See also Rice*, 941 F. Supp. at 1536. Ballots were distributed to registered voters. Ballots had to be returned to HSEC by Aug. 15, 1996. Votes were then counted on Aug. 23 and 24, 1996. *Id.*

[229] "Native Hawaiian Vote Results Announced," Sept. 11, 1996, accessed at <http://planet-hawaii.com/hsec/alert.html>. Following the announcement of the results of the Native Hawaiian Vote, the *Kakalia* action was dismissed. Kakalia v. Cayetano, Civ. No. 96-00616-DAE (D. Haw. 1996) (Order Granting Defendants Motion to Dismiss).

[230] Ibid. (citing Carey Goldberg, "Native Hawaiians Vote in Ethnic Referendum," *The New York Times*, July 23, 1996; Ellen Nakashima, "Native Hawaiians Consider Asking for their Islands Back: 100-Year-Old Cause Spurs Sovereignty Vote," *The Washington Post*, Aug. 26, 1996, p. A1).

[231] Ibid.

[232] *See* "Setting the Record Straight: Fact and Fiction About HSEC and the Native Hawaiian Vote" accessed at <http://planet-hawaii.com/hsec/record.html>; Ron Staton, "Native Hawaiians to Elect Delegates for Sovereignty Convention," *The Associated Press*, Jan. 15, 1999 (quoting a critic who called the process "tainted" and the "kiss of death"), accessed at <http://www.hawaii-nation.org/elect-delegates.html>.

Procedural History of the *Rice* Decision

On April 25, 1996, Harold Rice filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Hawai'i.[234] As reflected in his second amended complaint, filed on July 17, 1996, Rice alleged violations of his rights under the 14th and 15th Amendments of the United States Constitution, the Voting Rights Act, the Civil Rights Acts, and provisions of the Hawai'i State Constitution. These purported violations resulted from the state's denial of his application to register for the Native Hawaiian Vote, and for the election of trustees for the Office of Hawaiian Affairs.

Harold Rice is a Caucasian resident of Hawai'i, who is a descendant of pre-annexation inhabitants of the Kingdom of Hawaii.[235] He is neither a "Native Hawaiian" nor a "Hawaiian," as defined under OHA's voting eligibility requirements.[236] Rice attempted to register to vote in OHA's election for the board of trustees. He edited the voting registration form to attest, "I desire to vote in the OHA elections."[237] However, his registration was denied because he was not Hawaiian, although Rice was eligible and in fact registered to vote in other elections administered by the state.

On July 18, 1996, another group of plaintiffs (hereafter the "Kakalia Plaintiffs," who, unlike Rice, were eligible for the Native Hawaiian Vote) filed a complaint for declaratory and injunctive relief in the same court.[238] The Kakalia Plaintiffs sought a declaratory judgment that the Native Hawaiian Vote violated their rights under the supremacy clause, as well as the 14th and 15th Amendments of the United States Constitution, the Admission Act of 1959, and Section 1983 of the Civil Rights Act. On July 19, 1996, the Kakalia Plaintiffs filed a motion for a temporary restraining order to enjoin the tabulation and announcement of the results of the Native Hawaiian Vote.

The district court issued an order consolidating the *Rice* and *Kakalia* cases with respect to issues surrounding the Native Hawaiian Vote.[239] The court permitted the votes to be counted on August 23 and 24, 1996, but enjoined disclosure of the results and ordered the ballots sealed pending hearing on the plaintiffs' motion for preliminary injunction.[240] The motion sought to:

> enjoin the Defendants, their agents, servants, employees, and all persons acting under, in concert with, or for them, from (1) paying any funds or monies for the purposes of Act 359, (2) tabulating the ballots from the Native Hawaiian Vote, (3) conducting and preparing to conduct elections of convention delegates [in the event that the results of the Native Hawaiian Vote supported such action], and (4) taking any other action to implement Act 359.[241]

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[233] For more information on the convention, visit <http://www.hawaiianconvention.org>. Note that Ka Lāhui Hawai'i, discussed elsewhere in this report, previously adopted its own constitution in 1987, which provides for nation-within-a-nation status. The Nation of Hawai'i adopted its own constitution on Jan. 16, 1995, which provides for independence. *See* <http://www.Hawaii-nation.org/constitution.html>.

[234] Rice v. Cayetano, Civ. No. 96-00390-DAE (D. Haw. Apr. 25, 1996).

[235] The great-grandfather of the plaintiff in the *Rice* case, William Hyde Rice, was part of the group that imposed the Bayonet Constitution on King Kalākaua. Jon M. Van Dyke, "The 'Painful Irony' of *Rice v. Cayetano*," written statement submitted to the Hawaii Advisory Committee, Sept. 29, 2000, p. 4, n.13 (hereafter cited as Van Dyke, "Painful Irony").

[236] Rice v. Cayetano, 963 F. Supp. 1547, 1548 (D. Haw. 1996). Because the indigenous population of these islands is popularly known as "Hawaiian," this term obviously does not carry the same meaning as, for example, Californian or Texan.

[237] Rice v. Cayetano, 146 F.3d 1075, 1078 (9th Cir. 1998). The original form stated, "I am also Hawaiian and desire to register to vote in OHA elections." *Id.*

[238] Kakalia v. Cayetano, Civ. No. 96-00616-DAE (D. Haw. July 18, 1996).

[239] *Rice*, 941 F. Supp. at 1534 n.1 ("Civil Nos. 96-00390-DAE and 96-00616-DAE were consolidated for purposes of hearing and adjudication of claims in connection with the Native Hawaiian Vote").

[240] *Id.* at 1536–37 (citing Aug. 16, 1996, order granting in part and denying in part plaintiffs' motion for temporary restraining order).

[241] *Id.* at 1537. The Kakalia plaintiffs apparently were concerned about the constitutionality of the state's involvement in specific activities—including a central convention to draft a constitution and to discuss such issues as levying taxes, regulating commerce, etc.—and breach of the trust relationship. *Id.* at 1539 n.11. The court deferred ruling on issues concerning the convention of delegates until such time as the legislature took further action. *Id.* at 1539.

Plaintiffs' Motion for Preliminary Injunctive Relief

The primary focus of the plaintiffs' lawsuit centered on alleged infringements of their constitutional rights under the 14th and 15th Amendments of the United States Constitution, as well as assertions of a breach of fiduciary duty between the State of Hawai'i and its citizens. In reference to the 14th Amendment[242] claim, the plaintiffs asserted that Act 359 and the Election Guidelines provided an impermissible state benefit to some Hawai'i citizens, on the basis of their race.[243] They unsuccessfully argued that the equal protection clause of the 14th Amendment prohibited the exclusion of non-Native Hawaiian citizens from participating in the Native Hawaiian Vote. As a result, they attempted to persuade the district court to employ the most stringent analysis (i.e., a strict scrutiny standard of review) of their allegations of constitutional violations.[244]

In contrast, the defendants relied upon precedent established in *Morton v. Mancari*[245] and other cases that indicated the 14th Amendment's equal protection guarantees are not infringed by legislation that benefits Native Americans because they have a political relationship with the United States.[246] As a result, in *Mancari*, the Court determined that it should review the legislation in question with a rational basis analysis, a less stringent level of judicial review.[247] Moreover, the district court then observed that legal precedent established in *Naliielua v. State*[248] provides that special legislation for Native Hawaiians does not necessarily indicate the presence of a suspect racial classification that would warrant a strict scrutiny analysis.[249]

The district court ultimately reasoned that Congress had identified Native Hawaiians for special consideration, due to the State of Hawaii's fiduciary duties of serving as the trustee for ceded lands and administering the HHCA.[250] Thus, pursuant to the *Mancari* and *Naliielua* cases, the court found that the less stringent rational basis test was the appropriate level of judicial analysis for evaluating whether Act 359 and the Election Guidelines were constitutionally sound. The rational basis test required the State of Hawai'i to demonstrate that these legislative provisions were "rationally related to a legitimate state interest or to the state's unique obligation to the Native Hawaiians."[251] Recognizing that the State of Hawai'i has a particular duty to the Native Hawaiian population, as demonstrated by the state's fiduciary responsibilities under the HHCA, the district court concluded that Act 359 and the Election Guidelines satisfied a rational basis analysis.[252] Hence, these legislative provisions did not violate the equal protection clause of the 14th Amendment.

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[242] U.S. CONST. amend. XIV, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

[243] *Rice*, 941 F. Supp at 1539.

[244] *Id.* at 1539 (citing Adarand Constructors, Inc., v. Pena, 515 U.S. 200 (1995)). "A group classification such as one based on race is ordinarily subjected to detailed judicial scrutiny to ensure that the personal right to equal protection of the laws has not been infringed. Under this reasoning, even supposedly benign racial classifications must be subject to strict scrutiny." *Id.* at 1540.

[245] 417 U.S. 535 (1974).

[246] *Id.* at 555. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process." *Id.* The *Rice* defendants refer to various federal laws that classify Hawaiians as Native Americans. Accordingly, for the purposes of establishing the suitable level of judicial review, Hawaiians are comparable to Native Americans. *Rice*, 941 F. Supp. at 1539–40.

[247] 417 U.S. at 533–54. The *Mancari* court determined that the employment preference provided to Native American Bureau of Indian Affairs positions was considered a political inclination, not a racial preference. *Id.* at 551–52. The Court recognized that Native American tribes are viewed in a unique constitutional status, which is affected by the plenary power of Congress in Article I, § 8 of the United States Constitution. Therefore, Congress has justified preferential legislative provisions for Native Americans based upon the special relationship that exists between Indian tribes and the federal government. *See also* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (immunity from state taxation on cigarette sales and personal property).

[248] 795 F. Supp. 1009 (D. Haw. 1990), *aff'd*, 940 F.2d 1535 (9th Cir. 1991).

[249] *Rice*, 941 F. Supp. at 1541 (citing *Naliielua*, 795 F. Supp. at 1013).

[250] *Id.* at 1541–42 (citing United States v. John, 437 U.S. 634 (1978)). Further, Congress enacted the HHCA to reserve particular public property as Native Hawaiian lands. *Id.* at 1542. The district court was not persuaded by the plaintiffs' attempts to distinguish the *Mancari* case. *Id.* Although it acknowledged that Native Hawaiians are not a federally recognized tribal entity, it recognized that the U.S. Supreme Court has applied a rational basis analysis for preferential legislation for Native Americans who are not members of federally recognized tribes. *Id.*

[251] 941 F. Supp. at 1543.

Secondly, in reference to the plaintiffs' contention that Act 359 and the Election Guidelines infringed upon their 15th Amendment[253] and other constitutional protections, the court relied upon U.S. Supreme Court rulings in *Salyer Land Co. v. Tullare Water District*[254] and *Ball v. James*.[255] These cases maintained that the *Reynolds v. Sims'*[256] "one-person, one-vote" principle is not violated during specialized governmental elections that disproportionately affect a particular group of citizens.[257] As a result, the district court determined that the Hawai'i legislature created the Hawai'i Sovereignty Elections Council with limited authority, in order to serve as an information-gathering mechanism to measure local support for a Native Hawaiian sovereignty movement.[258] Hence, the district court deemed it likely that the *Rice* plaintiffs would be unsuccessful in prevailing on their constitutional claims.

The court similarly maintained that the plaintiffs could not support their argument that the supremacy clause of the Constitution had been violated.[259] In order to prove that state legislation infringes upon federal jurisdiction as established in the supremacy clause, it must be demonstrated that the legislation conflicts with an essential operation of a federal program, or that it excessively intrudes upon an area that Congress has regarded as exclusively federal authority.[260] To determine this, the district court considered the most applicable test for determining whether federal authority has preempted state law; specifically, whether "the federal law is sufficiently comprehensive to infer that Congress left no room for supplementary state regulation."[261] The court relied upon the following:

> The . . . test regarding federal occupation of the field, however, requires careful analysis because of precedent set by American Indian law. The threshold consideration for the federal occupation alternative is whether the subject matter at issue is within the exclusive domain of the federal government: if it is, this clause preempts all state regulations that would vitiate the impact or intent of the federal regulatory scheme; if it is not, a balancing of the federal and state interests is required.[262]

The district court concluded that since the federal government assigned primary guardianship and trust obligations for Native Hawaiians to the State of Hawai'i (through the HHCA and the Admission Act), proper discharge of the state's trust obligations may include seeking guidance from the Native Hawaiian people by determining their views in an election setting.[263]

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[252] *Id.* at 1543–44.

[253] U.S. CONST. amend. XV, §§ 1, 2. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. . . . The Congress shall have power to enforce this article by appropriate legislation." *Id.*

[254] 410 U.S. 719 (1973).

[255] 451 U.S. 355 (1981).

[256] 377 U.S. 533 (1964). "[T]he Supreme Court held that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. The court determined that in representative elections, the concept of political equality would be undermined unless [']as nearly as is practicable one man's vote . . . is to be worth as much as another's.[']" *Rice*, 941 F. Supp. at 1544 n.20 (citing *Reynolds*, 377 U.S. at 559).

[257] *Rice*, 941 F. Supp. at 1544 (citing *Ball*, 451 U.S. at 355; *Salyer*, 410 U.S. at 730–35). In *Salyer*, the Court applied a rational basis test to uphold the constitutionality of a California voter eligibility statute that restricted voting in an election to select water district directors to those who owned property.

[258] *Rice*, 941 F. Supp. at 1545.

[259] U.S. CONST. art. VI, cl. 2. The supremacy clause states in relevant part: "This Constitution and the Laws of the United States shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* The plaintiffs in *Rice* contended that "[a]ssuming the most extreme case, by enacting Act 359 the State of Hawai'i has committed itself to a process which may result in the establishment of a foreign nation which exercises exclusive control over all of the lands which currently constitute the public domain of the State." *Rice*, 941 F. Supp. at 1547.

[260] California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280–81 (1987).

[261] *Rice*, 941 F. Supp. at 1547 (citing *California Fed.*, 479 U.S. at 280–81). The *Rice* court found that the other two tests of federal preemption "(1) where Congress expressly preempts state law; (2) where state and federal law actually conflict" did not apply in this matter. *Id.*

[262] *Rice*, 941 F. Supp. at 1547–48 (citations omitted). "One avenue where preemption would apply is external/foreign affairs." *Id.* at 1548.

[263] *Id.* at 1549–50.

The plaintiffs asserted that the State of Hawai'i breached its fiduciary duty to Hawaiian citizens by using Act 359 and the Election Guidelines as a means of removing Hawaii's trust property from the rightful ownership of all citizens of Hawai'i and transferring it solely to Native Hawaiians.[264] Again, the district court found that the plaintiffs would not prevail on the merits. A plain reading of Act 359 contradicted the plaintiffs' argument:

> Act 359 . . . makes no reference to a transfer of land—trust or otherwise—to a sovereign Hawaiian government. Nor does it provide authorization or a mechanism for any such transfer. Furthermore, the court [found] that HSEC Defendants may have a legitimate qualified immunity argument because their actions do not appear to violate "clearly established law."[265]

Finally, the *Rice* plaintiffs were unable to show the likelihood of irreparable injury if the court did not act. Plaintiffs asserted that announcing the outcome of the Native Hawaiian Vote would adversely affect their ability to petition the federal government. The district court found there was no evidence that revealing the vote's results would inhibit the plaintiffs from using any previously established means of governmental redress.[266]

Motions for Partial Summary Judgment

In May 1997, the United States District Court for the District of Hawai'i considered motions for summary judgment from each of the primary parties in the *Rice* case—the plaintiff, Harold Rice, and the defendant, governor of Hawai'i, Benjamin J. Cayetano. The court denied plaintiff's motion for partial summary judgment and granted defendant's motion for partial summary judgment.

In order to prevail on such a motion, the party seeking summary judgment must demonstrate that he or she is entitled to judgment as a matter of law, even if all issues of fact are resolved in favor of the other party.[267] Although rejected by the court on his prior motion for preliminary injunction, Rice reiterated that the *Mancari* case did not control whether Native Hawaiians are a federally recognized Native American tribe. Rice claimed that Article XII, Section 5 of the Hawai'i Constitution[268] and Section 13D of the Hawai'i Revised Statutes[269] violated the 14th and 15th Amendments by permitting the election of OHA trustees and excluding non-Hawaiians from the voting process. In opposition, the defendant recognized that while Native Hawaiians are not a federally recognized Indian tribe or quasi-sovereign tribal entity, the rational basis test is still the appropriate standard for reviewing this matter, since Native Hawaiians are a political group.[270]

Although Native Hawaiians have not been formally recognized as an Indian tribe, the district court found the absence of formal recognition did not significantly contribute to its analysis of previous precedent.[271] However, the court considered the existence of the trust relationship between the State of Hawai'i and Native Hawaiians, as evidenced by the HHCA, as a central reason why Native Hawaiians were not originally included in the federal Native American acknowledgment process.[272] The district court then determined that the unique guardian-ward relationship between the State of Hawai'i and Native Hawaiians was a more essential element in its analysis than formal federally recognized status. Accordingly, the court concluded that *Mancari's* holding that Native Americans constitute a political group rather than a racial classification is also applicable to Native Hawaiians.[273]

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[264] *Id.* at 1551. The plaintiffs maintained that § 5(f) of the Admission Act of 1959, relating to using a portion of the proceeds from the trust lands "for the betterment of the conditions of Native Hawaiians" had been violated.

[265] *Id.*

[266] *Id.* at 1552–53. The court determined that preventing the announcement of the vote would only impede the public's confidence in the democratic process.

[267] Fed. R. Civ. P. 56(c). "[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* The party requesting the motion for summary judgment has the burden of "identifying . . . those portions of the material on file that it believes demonstrates the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc., v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). After the (moving) party who is seeking the motion for summary judgment has met its burden of proving there is no issue of material fact in the case, "the non-moving party must show that there are 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party.' " California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

[268] Haw. Const. art XII, § 5. This section establishes the Office of Hawaiian Affairs.

[269] Haw. Rev. Stat. § 13D-1 (2000). "The board of trustees shall be composed of nine members elected at-large by qualified voters in the State who are Hawaiian." *Id.*

[270] *Rice*, 963 F. Supp. at 1549–50. The defendant noted that Congress has identified Native Hawaiians for rehabilitation and special attention. *Id.* Further, "[t]he State of Hawaii has a unique obligation to the Native Hawaiian population with fiduciary duties similar to those owed by the federal government to Native Americans, and that the State has a special responsibility to protect traditional rights of access to land for subsistence, cultural and religious purposes." *Id.* The state's relationship to the Native Hawaiians is therefore similar to the federal government's connection with Native American groups. *Id.*

Rice maintained that the trust relationship established by the Admission Act was not meant exclusively for Native Hawaiians. He also indicated that the State of Hawai'i is attempting to constructively establish an Indian tribe with self-governing power by permitting OHA's board of trustees to be elected only by Native Hawaiians.[274] The state responded that (1) Hawaiians share a similar status with aboriginal people and Native Americans, which satisfies *Mancari's* equal protection requirements; (2) the state's trust obligation is furthered when Native Hawaiians participate in OHA's election decisions, which reduces the negative impact on non-Hawaiians who would have to administer matters that affect Native Hawaiians; and (3) the trust partly benefits Hawaiians.[275] In response, the district court concluded the establishment of OHA does not create a "tribe" of Native Hawaiians, nor does it provide them with self-governing power.[276]

Lastly, the court examined the parties' "one-person, one-vote" arguments. The defendant emphasized that the OHA was created for a particular purpose and given restricted governmental authority.[277] OHA's elections, therefore, satisfy the *Salyer* "special interest" election exception.[278] In contrast, the plaintiff argued (inaccurately) that OHA has more extensive authority, since it provides social and governmental services to a specific group based on race (i.e., Native Hawaiians).[279] Nevertheless, the district court ultimately held that in spite of its delineated statutory powers, OHA cannot be viewed as a general governmental authority, since it does not impose taxes or control the issuance of educational, health, and welfare services to Hawaiian and Native Hawaiian citizens.[280] Therefore, the *Reynolds v. Sims* "one-person, one-vote" restriction was not violated.[281] Accordingly, the district court opined:

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[271] *Rice*, 963 F. Supp. at 1553. The court observed that the administrative procedures for obtaining federal recognition or "acknowledgment" exclude aboriginal people who are from outside the continental United States. *Id.* (citing William W. Quinn, "Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept," *American Journal of Legal History*, vol. 34 (1990), p. 331) "[O]nly Indian tribes that were acknowledged would be provided with services and dealt with in trust relationships." Quinn, "Federal Acknowledgement," p. 347. *See also* Montoya v. United States, 180 U.S. 261, 266 (1901) (providing common law requirements for Indian tribe status); United States v. Washington, 520 F.2d 676 (9th Cir. 1975) (holding that tribal rights were predicated on receiving federal acknowledgment).

[272] *Rice*, 963 F. Supp. at 1553–54.

[273] *Id.* at 1554. "[T]he requirements of the Fourteenth and Fifteenth Amendments are not violated because the restriction on the right to vote is not based upon race, but upon a recognition of the unique status of Native Hawaiians." *Id.*

[274] *Id.* at 1555. The plaintiff relies upon Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500–01 (1979) (observing that states do not enjoy the same unique relationship with Indians that permits the federal government to enact legislation singling out tribal Indians). *Id.; but see id.* at 501 (applying rational basis scrutiny to state legislation enacted "under explicit authority granted by Congress").

[275] *Rice*, 963 F. Supp. at 1554–55.

[276] *Id.*

[277] *See* HAW. REV. STAT. §§ 10-4, 10-6 (2000). The general duties of OHA's board of trustees shall be "(1) To develop, implement, and continually update a comprehensive master plan for native Hawaiians and Hawaiians. . . . (2) To assist in the development of state and county agency plans for native Hawaiian and Hawaiian programs and services; (3) To maintain an inventory of federal, state, county, and private programs and services for Hawaiians and native Hawaiians and act as a clearinghouse and referral agency; (4) To advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians; (5) To conduct, encourage, and maintain research relating to native Hawaiians and Hawaiians; (6) To develop and review models for comprehensive native Hawaiian and Hawaiian programs; (7) To act as a clearinghouse for applications for federal or state assistance to carry out native Hawaiian or Hawaiian programs or projects; (8) To apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians; and (9) To promote and assist the establishment of agencies to serve native Hawaiians and Hawaiians." *Id.* § 10-6.

[278] *Rice*, 963 F. Supp. at 1555. In *Salyer*, the Court applied a rational basis test to uphold the constitutionality of a California voter eligibility statute that restricted voting in an election to select water district directors to those who owned property. Salyer v. Tullare, 410 U.S. 719 (1973).

[279] *Rice*, 963 F. Supp. at 1557.

> The court concludes that the method of electing OHA Trustees as presently provided by state law meets constitutional standards and therefore the court denies Plaintiff's Motion for Partial Summary Judgment and grants Defendant's Motion for Partial Summary Judgment.[282]

Appeal to the U.S. Court of Appeals, Ninth Circuit

In June 1998, the United States Court of Appeals for the Ninth Circuit heard arguments on appeal from the lower court's decision. The primary issue was whether the State of Hawai'i could restrict voting eligibility in special trustee elections to Native Hawaiians, the intended trust beneficiaries.[283] Rice reiterated his earlier claims that OHA's voting eligibility requirements for board of trustee elections violated his constitutional rights under the 14th and 15th Amendments, because they were allegedly race based and therefore could not pass strict scrutiny analysis.[284] Moreover, he indicated that his 15th Amendment rights had been infringed upon because OHA's voting eligibility restriction created a requirement that the right to vote is based upon race. Furthermore, Rice tried to argue that an election limited to Native Hawaiians offends "the anti-nobility prohibitions of the United States Constitution because it establishes immutable classes among citizens, giving some greater entitlement to political power than others, based solely on birth and ancestry."[285] The defendant countered Rice's claims by indicating that the definition of Native Hawaiians or Hawaiians is the essential issue. Limiting the right to vote for OHA's board of trustees to Native Hawaiians does not constitute a racial classification. As a result, the State of Hawai'i contented that OHA's voting requirements satisfied precedent established in *Mancari* for a rational basis review.[286]

The Ninth Circuit observed that OHA's voting restriction is legal or political, not primarily racial, since the State of Hawai'i rationally surmised that Hawaiians are the group to which OHA trustees owe a duty of loyalty.[287] The court also noted that the voting restriction only applies during special elections, while all qualified citizens are eligible to vote in general elections.[288] Although the Ninth Circuit acknowledged that Native Hawaiians are not identically situated with federally recognized Native American peoples, it reasoned that the State of Hawaii's particular trust relationship with Native Hawaiians provided the authority to validate OHA's voting restriction.[289] Moreover, the court viewed the voting qualification as an indication of OHA's sole fiduciary duty to Native Hawaiians, instead of a means of preventing non-Hawaiians from participating in the overall election process.[290]

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[280] *Id.* at 1557 (citing Bd. of Estimate of New York v. Morris, 489 U.S. 688, 696 (1989)). The district court distinguishes the facts in the instant case from those in *Morris*, where the U.S. Supreme Court found that New York City's Board of Estimate was "comfortably within the category of governmental bodies whose 'powers are general enough and have sufficient impact throughout the district' to require that elections to the body comply with equal protection strictures."

[281] *Id.* at 1558.

[282] *Id.*

[283] *Rice*, 146 F.3d at 1076.

[284] *Id.* at 1078. *See also* Adarand v. Pena, 515 U.S. 200 (1995).

[285] *Rice*, 146 F.3d at 1078.

[286] *Id.* at 1078–79. Furthermore, according to the defendants, no intentional racial discrimination occurred because Congress required that the newly created State of Hawai'i accept the definition of "native Hawaiian" in the HHCA and comply with the trust obligations to improve the condition of Native Hawaiians. *But see id.* at 1079. Rice asserted that the legal status of being a beneficiary of the trust is centered on race.

[287] *Id.* at 1079 (citing HAW. REV. STAT. § 10-16(c) (2000) for the proposition that board members could be subject to litigation for instances of breach of fiduciary duty).

[288] *Id.* at 1080. The Court relied upon precedent established in *Salyer*, *Ball*, and *Reynolds*.

[289] *Id.* at 1081. The federal government's preferential treatment toward Native Americans is a political consideration, instead of a racial classification. Race may be used as eligibility criteria for the entitlement. Alaska Chapter, Associated Gen. Contractors, v. Pierce, 694 F.2d 1162 (9th Cir. 1982). The court felt compelled to adhere to the U.S. Supreme Court's ruling in *Mancari* and its own prior decisions in the Ninth Circuit, such as *Pierce*. *Rice*, 146 F.3d at 1081 n.17.

[290] *Rice*, 146 F.3d at 1081; *see* 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, STANDING COMM. REP. NO. 59 at 644. The committee stated that there should be elected trustees so that "people to whom assets belong should have control over them. . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." *Id.*

In reference to the plaintiff's 14th Amendment argument, the Ninth Circuit agreed the statutory Election Guidelines created a racial classification; however, the court concluded that the voting qualification should not be viewed as being "racial" in context.[291] The court explained that OHA's voting guidelines are comparable to *Salyer's* restriction of voting to landowners, instead of the type of racial preference in *Adarand*.[292] In the alternative, the Ninth Circuit subjected the Election Guidelines to a strict scrutiny analysis:

> [E]ven if the voting restriction must be subjected to strict judicial scrutiny because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawai'i and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there—which is not challenged in this appeal. Thus, the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on voter eligibility is precisely tailored to the perceived value that a board chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.[293]

As a result, the Ninth Circuit affirmed the district court's ruling as to the constitutionality of the voting qualification. The Ninth Circuit reasoned that there was no race-neutral mechanism for limiting the election of OHA trustees to those individuals who had a legal interest in the management of their trust assets, "except to do so according to the statutory definition by blood quantum which makes the beneficiaries the same as the voters."[294]

Writ of Certiorari to the U.S. Supreme Court

After the Ninth Circuit affirmed the district court's decision, Rice appealed to the U.S. Supreme Court.[295] The Supreme Court, in a split decision and on narrow grounds, reversed the Ninth Circuit. The Court held that the statute permitting only Hawaiians to vote for trustees of OHA (technically, a state agency) created a race-based classification in violation of the 15th Amendment of the Constitution.[296]

Majority Opinion

The Supreme Court arrived at its conclusion by ignoring critical issues raised by the State of Hawai'i and several *amici curiae* in this case.[297] It is significant to note that the majority decision explicitly refused to decide the issue of whether Native Hawaiians were analogous to Indian tribes for the purposes of constitutional analysis. To do so, the Court reasoned:

> it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, dele-

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[291] *Rice*, 146 F.3d at 1082.

[292] *Id.*

[293] *Id.* (citing 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, STANDING COMM. REP. NO. 59 at 644).

[294] *Id.*

[295] *Amici curiae* briefs supporting the State of Hawai'i were filed by Alaska Federation of Natives and Cook Inlet Region, Inc.; Hawai'i Congressional Delegation; National Congress of American Indians; Office of Hawaiian Affairs, Ka Lāhui Hawai'i, the Association of Hawaiian Civic Clubs, Council of Hawaiian Organizations, Native Hawaiian Convention, Native Hawaiian Advisory Council, Hā Hawai'i, Hui Kalai'āina, Alu Like, Inc., and Papa Ola Lokahi; Kamehameha Schools Bishop Estate Trust; State Council of Hawaiian Homestead Associations, Hui Kāko'o 'Āina Ho'opulapula, Kalama'ula Homestead Association and Hawaiian Homes Commission; states of California, Alabama, Nevada, New Mexico, Oklahoma, and Oregon, the Commonwealth of the Northern Mariana Islands, and the Territory of Guam; United States; the Hou Hawaiians and Maui Loa, Native Hawaiian Beneficiaries (arguing that programs should be limited, however, to "native Hawaiians"—i.e., persons with 50 percent or more Native Hawaiian blood).

Amici curiae briefs supporting Rice were filed by Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, and the United States Justice Foundation; Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom; and Pacific Legal Foundation.

[296] *Rice*, 120 S. Ct. at 1047–48. Justice Kennedy delivered the opinion of the Court, joined by Justices Rehnquist, O'Connor, Scalia, and Thomas. Justice Breyer filed an opinion that concurred in the result of the majority's opinion, which was joined by Justice Souter. Justice Stevens filed a dissenting opinion, joined in part by Justice Ginsburg, who also filed a separate dissenting opinion.

[297] To view the legal briefs submitted by the parties and numerous *amici curiae* in this case, access <http://supreme.lp.findlaw.com/supreme_court/docket/octdocket.htm#98-818>. <http://www.nativehawaiians.com/legal_doc.html>; *See also* <http://www.all4aloha.org/headingsaloha4.html>. For contrary viewpoints, access <http://www.aloha4all.org>, <www.angelfire.com/hi2/hawaiiansovereignty/index.html>, or <http://www.hawaiimatters.com>.

> gated to the State a broad authority to preserve that status. **These propositions would raise questions of considerable moment and difficulty.** It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. *Compare* Van Dyke, *The Political Status of the Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998), *with* Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L. J. 537 (1996). **We can stay far off that difficult terrain**, however.[298]

Having avoided this fundamental (and arguably determinative) issue, the Court nevertheless distinguishes *Morton v. Mancari*—a decision recognizing the existence of a political relationship between the government and indigenous groups—as being restricted to the Bureau of Indian Affairs.[299] The fact that more than 150 congressional enactments recognize Native Hawaiians as Native Americans belies this asserted distinction.[300] These laws extend to Native Hawaiians many of "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities."[301]

In its introduction, the Court recites selective details about the history of oppression experienced by Native Hawaiians but then ignores their consequences.[302] For example, the majority opinion cites U.S. military participation in the 1893 overthrow of the Hawaiian monarchy and the unlawful taking of 1,800,000 acres of Hawaiian land. However, the Court ultimately fails to recognize the importance of this history in the development of a trust relationship between the U.S. government and Native Hawaiians and their desire for self-governance. Although it is true that the obligations attendant to the special relationship between the United States and its indigenous people are ordinarily carried out by the federal government, in this case, they were delegated first to the territory and subsequently to the newly formed state of Hawai'i, upon its admission to the Union.[303] Had the Court shown any understanding of the last two centuries of Native Hawaiian history, including dominion and control by European and U.S. settlers/governments, the Court could not have set aside the fundamental question of whether Native Hawaiians are analogous to Indian tribes.

Indeed, the Supreme Court recognized that the federal government had delegated its special obligation to indigenous Hawaiians to the State of Hawai'i and further recognized this unique relationship in the creation of the Office of Hawaiian Affairs. OHA was created, pursuant to a 1978 amendment to Hawaii's Constitution, in order to establish a "public trust entity for the benefit of the people of Hawaiian ancestry."[304] The Court acknowledges that "OHA has a unique position under state law," that it operates "independent from the executive branch and all other branches of government although it will assume the status of a state agency," and further "assume[s] the validity of the underlying administrative structure and trusts. . . ."[305] Yet, the Court circumvents the core issues with a conclusory observation that OHA remains an arm of the state and, therefore, its elections are affairs of the state. The Court refuses to make the connection that the OHA election for trustees is a mechanism to perform the trust obligations delegated to the state by the federal government and, therefore, that OHA's voting procedures should not be viewed as race-based discrimination.[306] Finally, the Court did not decide whether Hawaii's voting procedures to elect trustees of the OHA violated the 14th Amendment.

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[298] *Id.* at 1057–58 (emphasis added).

[299] *Id.*

[300] *Id.* at 1065 n.9 (Stevens, J., dissenting); *id.* at 1073 (Ginsburg, J., dissenting).

[301] 42 U.S.C. § 11701(19) (1995).

[302] 120 S. Ct. at 1048–53.

[303] Therefore, the voting requirements were primarily designed to carry out the mandate of the government's special obligation to Native Hawaiians. Having indigenous Hawaiians elect OHA trustees promotes self-determination by Native Hawaiians and helps to ensure that OHA will administer the trust in a way that is responsive to their interests. Accordingly, the voting requirements for trustees of the OHA are rationally related to the fulfillment of Congress' unique obligation to Native Hawaiians. The Court in *Mancari* held that because the BIA preference could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" and was "reasonably and rationally designed to further Indian self-government," it did not offend the Constitution. *Mancari*, 417 U.S. at 555. Similarly, the district court found that the electoral scheme was "rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the Section 5(b) lands for the betterment of Native Hawaiians" and therefore the voting restriction did not violate the Constitution's ban on racial classifications. *Rice*, 963 F. Supp. at 1555. The Ninth Circuit held that "to accept the trusts and their administrative structure as [it found] them, and assume that both are lawful," then Hawai'i "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Rice*, 146 F.3d at 1079.

[304] *Rice*, 120 S. Ct. at 1052.

[305] *Id.* at 1059.

Concurring Opinion

Justice Breyer's concurring opinion (joined by Justice Souter) first acknowledged that the majority opinion did not directly deny the analogy between Native Hawaiians and Indian tribes.[307] Justice Breyer then observed that "Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans."[308] However, Justices Breyer and Souter ultimately joined in the result reached by the majority because of their concern that the OHA electorate included 130,000 "additional 'Hawaiians'" of less than 50 percent Native Hawaiian blood, a definition they felt to be too broad compared with any other Native American tribal definition that they could find.[309]

This focus on identifying an appropriate blood quantum demonstrates the preoccupation with race in America.[310] However, Justices Breyer and Souter subsequently recognize that being "Indian" in the United States is, properly, a matter of cultural identity:

> The Alaska Native Claims Settlement Act . . . defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is . . . regarded as Native by any village or group" (*a classification perhaps more likely to reflect real group membership than any blood quantum requirement*). 43 U.S.C. § 1602(b).[311]

Although Justice Breyer stated that "there is no 'trust' for native Hawaiians here," he did not say that no trust exists; instead, OHA and its electorate are not congruent with any trust that may have been established.[312] The paragraphs following this statement, which emphasize that OHA receives funds from several sources and that OHA's membership is not limited by any defined blood quantum, clarify the meaning and intent of this statement.[313] Justice Breyer also notes that the trust established under the Admission Act benefits both the general public and Native Hawaiians, but this fact does not serve to diminish the rights of Native Hawaiians as beneficiaries of that trust.[314] Finally, Justice Breyer concedes that Hawaii's definitions of "Native Hawaiian" do not inherently violate the Constitution, just that this particular application is unconstitutional.[315]

Dissenting Opinion—Justice Stevens[316]

Justice Stevens' dissent (joined by Justice Ginsburg) argued that the majority's opinion fails to relate the compelling history of the State of Hawai'i "to rectify the wrongs of the past, and to put into being the mandate of our federal government—the betterment of the conditions of

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[306] Congress has explicitly recognized OHA's role in administering programs for Native Hawaiians, finding that OHA "serves and represents the interests of Native Hawaiians," and that OHA "has as a primary and stated purpose the provision of services to Native Hawaiians." 16 U.S.C. § 470w(18) (1994), and Congress has also made OHA eligible to administer federal programs on behalf of Native Hawaiians. 16 U.S.C. § 470w(18) (1994); 20 U.S.C. §§ 4441(c)(2)(B) (1994), 7904(b)(3) and (f) (1994); 42 U.S.C. §§ 2991b-1(a) (1994), 11711(7)(A)(ii) (1994). Congress has also been fully aware that OHA trustees are elected by indigenous Hawaiians. *See* S. REP. NO. 100-581 (1988) (concluding that the election of the OHA trustees by Native Hawaiians represents "a rational means of effectuating the state's obligation under the trust relationship to Native Hawaiians").

[307] *Rice*, 120 S. Ct. at 1061 (Breyer, J., concurring).

[308] *Id.*

[309] *Id.* Justice Breyer's expressed concern that persons with one-five-hundredth Native Hawaiian blood could vote for OHA trustees is a gross exaggeration; the minimum amount of Native Hawaiian blood that one is likely to find is a one-thirty-second or, perhaps, a one-sixty-fourth percentage. Van Dyke, "Painful Irony," p. 11, n.46.

[310] *See, e.g.*, Advisory Board to the President's Initiative on Race, *One America in the 21st Century: Forging a New Future*, 1998, pp. 33–56; Ian Haney Lopez, *White by Law: The Legal Construction of Race*, 1996, pp. 165–67; Michael Omi and Howard Winant, *Racial Formation in the United States*, 1994, p. 55.

[311] *Rice*, 120 S. Ct. at 1062 (emphasis added). *See also* Mary Coombs, "Interrogating Identity," *African American Law & Policy Review*, vol. 2 (1995), p. 97 (discussing various approaches to defining race as a shared cultural experience).

[312] *Id.* at 1061.

[313] *Id.* at 1061–62.

[314] *Id.* at 1061; Van Dyke, "Painful Irony," p. 30, n.107.

[315] *Rice*, 120 S. Ct. at 1062 (citing Justice Stevens' dissent at 1066–67 as providing sufficiently analogous support for this conclusion).

[316] The dissent was joined by Justice Ginsburg for part II.

Native Hawaiians."[317] Justices Stevens and Ginsburg would have upheld the state's voting qualification for the election of OHA trustees, by initially stressing that the federal government must be allotted great discretion in meeting its obligation to aboriginal citizens who reside in lands that are now U.S. territories.[318] In addition, the dissent found there was no "invidious discrimination" in this case that would prohibit efforts to preserve the Native Hawaiian culture and compensate Native Hawaiians for historic wrongdoing.[319]

Part II of Justice Stevens' dissent discussed how the U.S. Supreme Court has acknowledged Congress' plenary power over Native American concerns, as well as the fiduciary nature of the relationship between the federal government and formerly sovereign citizens.[320] Moreover, the dissent pointed out that "[a]mong the many and varied laws passed by Congress in carrying out its duty to indigenous peoples, more than 150 today expressly include Native Hawaiians as part of the class of Native Americans benefited."[321] The dissent noted the majority's failure to acknowledge the similarities between the Native Hawaiian situation and that of Native Americans. Specifically,

> [t]he descendants of the native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands, not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized "guardian-ward" relationship with the Government of the United States. It follows that legislation targeting the native Hawaiians must be evaluated according to the same understanding of equal protection that this Court has long applied to the Indians on the continental United States: that "special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation" toward the native peoples.[322]

Referencing the majority's view that tribal membership was essential to the holding in *Mancari*, the dissent explained that the Bureau of Indian Affairs' employment preference not only included nontribal member Native Americans, but also mandated that Native Americans possess a quantifiable and specific lineage of Indian blood.[323]

The dissent dismissed the majority's view that the OHA elections, which were approved by the entire state of Hawai'i, are "the affair of the state," instead of the actions of a "tribe."[324] The dissent agreed with the state's position that OHA's trustee elections are a mechanism to carry out the federal government's trust obligations.[325] For example, the dissent found *Washington v. Confederated Bands and Tribes of Yakima Nation* to be controlling authority on this particular issue. The dissent noted that in *Yakima*, the Court upheld a 14th Amendment challenge to a Washington State law that provided jurisdictional responsibility for Native American tribes in the state.[326] Although federal entities are primarily responsible for the governmental relationship with Native American tribes, the *Yakima* court concluded that Washington State law was "in response to a federal measure intended to achieve the result accomplished by the challenged state law, [and therefore] the state law itself need only rationally further the purpose identified by the State."[327]

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[317] *Rice*, 120 S. Ct. at 1063 (Stevens J., dissenting) (citing App. E to Brief for Hawai'i Congressional Delegation as *Amicus Curiae* E-3, statements of Senator Inouye of Hawai'i).

[318] *Id.* The dissent also recognized that the State of Hawai'i now has the fiduciary responsibility for the public trust, a role that the federal government once performed.

[319] *Id.*

[320] *Id.* at 1064 (citing United States v. Kagama, 118 U.S. 375, 383–84 (1886)). "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." *Id. See also* United States v. Sandoval, 231 U.S. 28 (1913).

[321] *Rice*, 120 S. Ct. at 1066 n.9 (citing American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2001); Native American Programs Act of 1974, 42 U.S.C. §§ 2991–2992 (2001); Comprehensive Employment and Training Act, 29 U.S.C. § 872 (repealed 1982)).

[322] *Id.* at 1066.

[323] *Id. Mancari*, 417 U.S. at 553 n.24. *See* Philip P. Frickey, "Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law," *Harvard Law Review*, vol. 110 (1997), pp. 1754, 1761–62.

[324] *Rice*, 120 S. Ct. at 1067.

[325] *Id.* "This Court has held more than once that the federal power to pass laws fulfilling its trust relationship with the Indians may be delegated to the States." *Id.*

[326] *Id.* (citing Washington v. Yakima, 439 U.S. 463, 500–01 (1979)).

[327] *Id.* at 1067 (citations and quotation marks omitted).

In part III of Justice Stevens' dissenting opinion, the analysis focused on the majority's view that OHA's voting qualification violated the plaintiffs 15th Amendment rights. Because OHA's trustee elections included particular ancestry and current residency as voting eligibility requirements, the dissent maintained that "the ability to vote is a function of the lineal descent of a modern-day resident of Hawai'i, not the blood-based characteristics of that resident, or of the blood-based proximity of that resident to the 'peoples' from whom that descendant arises."[328] The dissent indicated that the framers of the Constitution deemed there was no 15th Amendment prohibition against the specific use of ancestry in protecting the right to vote. Although Justice Stevens agreed with the majority that ancestry can be a proxy for race or the presence of invidious racial discrimination, he emphasized that it is not always the case. Instead, the dissent reasoned that the cases relied upon by the majority (for the proposition that ancestry can be a proxy for race) "have no application to a system designed to empower politically the remaining members of a class of people once sovereign, indigenous people."[329]

Additionally, the dissent found no racially invidious intent relating to the State of Hawaii's decision to expand the pool of eligible voters in OHA's board of trustee elections to "any descendant" of a 1778 resident of the Hawaiian islands.[330] Justice Stevens determined this decision had the effect of ensuring there was a sufficient number of eligible voters with similar ancestry and culture. "[T]he political and cultural interests served are—unlike racial survival—shared by both Native Hawaiians and Hawaiians."[331] Moreover, the dissent indicated that OHA's voting qualifications were approved by a democratic vote of a multiracial majority of all state citizens, which included non-Native Hawaiians who are not eligible to participate in OHA's trustee elections.[332] In contrast to the majority's view, the dissent found no "demeaning" consequence of a citizen being ineligible to vote in OHA's board of trustee elections. The actual reason for the voting requirements stems from other intentions. Specifically,

> families with "any" ancestor who lived in Hawaii in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to compensation and self-determination that others do not. For the multi-racial majority of the citizens of the State of Hawaii to recognize that deep reality is not to demean their own interests but to honor those of others.[333]

Part IV of Justice Stevens' dissent observed that 15th Amendment case law, which was predicated on perpetuating discriminatory voting schemes in the Old South, is not analogous to the goal of achieving self-determination for indigenous Hawaiian people, in light of their particular history.[334] He concurred with Judge Rymer of the Ninth Circuit, who viewed the voting qualification, not as a means to ostracize those citizens who may be interested in OHA's concerns, but as a reflection of the trustees' sole fiduciary duty to Native Hawaiians.[335]

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[328] *Id.* at 1068.

[329] *Id.* at 1069. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 469 (1953). In *Terry*, the Court maintained that an amendment that prohibited Texas "Jaybird primaries" employed neutral voting qualifications, but "Negroes were excluded." *Id.*

[330] *Id.* at 1070.

[331] *Id.* (footnote omitted).

[332] *Id.* at 1071. "Conversely, unlike many of the old southern voting schemes in which any potential voter with a 'taint' of non-Hawaiian blood would be excluded, the OHA scheme excludes no descendant of a 1778 resident because he or she is also part European, Asian, or African as a matter of race. The classification here is thus both too inclusive and not inclusive enough to fall strictly along racial lines." *Id.*

Regarding this democratic vote of a multiracial majority of all state citizens, which included non-Native Hawaiians who are not eligible to participate in OHA's trustee elections, Associate Justice Simeon Acoba of the Hawai'i Supreme Court made the following incisive observation:

"In concluding its decision, the *Rice* majority reminded the State of Hawai'i that 'it must, as always, seek . . . political consensus . . . [and o]ne of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawai'i.' *Rice*, . . . 120 S. at 1060. I do not understand the State's position to have ever disavowed our constitutional heritage and find nothing in the decisions of Judge David Ezra of the Hawai'i Federal District Court, or in the opinions of the Ninth Circuit Court of Appeals, or of the dissenting United States Supreme Court justices espousing that view of the State's arguments. *The history of Hawai'i and its peoples demonstrates nothing, if not the wholesale embracement of democratic principles. Few places in the United States have brought democracy's promise closer to reality, see id. at . . . 1054, and a more successful marriage between constitution and culture, as that exemplified in our State, can hardly be found. Hawai'i has affirmed our constitutional heritage, Hawai'i has upheld that heritage, and Hawai'i's own have many times been in the forefront of defending it.*"

Office of Hawaiian Affairs v. Cayetano, 94 Hawai'i 1, 8 n.2 6 P.3d 799, 808 n.2 (2000) (Acoba, J., concurring) (emphasis added).

[333] *Id.* at 1072.

[334] *Id.*

Dissenting Opinion—Justice Ginsburg

Justice Ginsburg's dissent concurred with Justice Stevens' reliance upon established federal authority over Native Americans or, more particularly, "Congress' prerogative to enter into special trust relationships with indigenous peoples."[336] Justice Ginsburg then added that both the majority and Justice Stevens recognized that "federal trust responsibility . . . has been delegated by Congress to the State of Hawai'i."[337] She concludes that "[b]oth the Office of Hawaiian Affairs and the voting scheme here at issue are 'tied rationally to the fulfillment' of that obligation."[338]

Vacated Court of Appeals Decision

As a result of the U.S. Supreme Court's opinion, the Ninth Circuit vacated its 1998 *Rice* decision, reversed the district court's opinion, and referred the case to the trial court for further action consistent with the Supreme Court's opinion.[339] The district court entered judgment, consistent with a stipulation by the parties, simply declaring that the plaintiff's 15th Amendment rights were violated.[340] However, Judge Ezra characterized the Supreme Court's opinion in *Rice* as follows:

> This was by no means a unanimous court but rather a fractured one in reaching its decision. Of course, we must all respect the final result and obey the holding of the Supreme Court. . . . However, it must be remembered that the Supreme Court is a dynamic institution, a body who in history has many times and in the most important context reviewed and reconsidered its decisions. The Supreme Court once ruled in Plessy versus Ferguson that "separate but equal" met constitutional standards in education. The error of that decision was corrected by—and in subsequent years by unanimous decision of Brown versus Board of Education. . . . Today we do not know, and we cannot know, what the ultimate significance of the decision in this case will be. The holding may stand or at some future time the Supreme Court may reconsider, reverse itself, or severely limit the impact of its decision. But this much we do know. The decision was a narrow one, restricted to the single issue of state-sponsored Hawaiian-only elections. The suggested precedential value of the United States Supreme Court's decision in other contexts is problematic and speculative at best.[341]

Public Comment on the Supreme Court's Decision

From the moment the *Rice v. Cayetano* decision was rendered, there was vocal public reaction in Hawai'i. The decision fueled the already divisive debate surrounding entitlement programs, self-governance, and identity. Supporters of the decision praised the Court for its adherence to what they saw as a constitutionally required rejection of race-based privilege, while opponents, including most Native Hawaiians, were confused by what they saw as one more setback in their struggle for self-governance. The frustration and anger resonating in Native Hawaiian communities as a result of the *Rice* ruling prompted the Advisory Committee's September 2000 forum.

Fear for the Future: Opposition to the Rice Decision

> *[T]he decision in Rice v. Cayetano is just a continuation of the conspiracy to wipe out the status of a proud people and a peaceful, neutral nation. I was shocked to read the decisions from the U.S. Supreme Court. I found them so lacking in historical research and intelligent arguments.*[342]

As would be expected, given the controversy surrounding the *Rice* decision, members of the public who spoke before the Hawaii Advisory Committee gave passionate accounts of their perceptions. Perhaps the most commonly voiced concern about the *Rice* decision was that, even though it had only been recently rendered, its effects were already being felt by the Native Hawaiian community. For example, David Helela, a Native Hawaiian, testified that *Rice* has already had a negative effect on the public's perceptions of Native Hawaiian programs:

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[335] *Id.*

[336] *Id.* at 1073 (Ginsburg, J. dissenting).

[337] *Id.*

[338] *Id.* (citing *Mancari*, 417 U.S. at 555).

[339] *Rice*, 208 F.3d at 1102.

[340] Rice v. Cayetano, Civ. No. 96-00390-DAE (D. Haw. Apr. 7, 2000) (Transcript of Proceedings, Hearing on Remand from the United States Supreme Court; U.S. Court of Appeals for the Ninth Circuit; Motion to Intervene).

[341] *Id.* at 7–8.

[342] Sondra Field-Grace statement, Forum 2000 Transcript, p. 215.

> Since the *Rice* decision in February, there's been a marked increase in public expressions against programs and services that benefit Native Hawaiians only. We're seeing on an almost daily basis in our newspapers letters to the editor that argue for ending the so-called race-based programs [and] that there was no reason Native Hawaiians should be given preferential treatment over other Americans.[343]

Representatives from Hawaiian organizations and programs echoed this observation, pointing out effects the fallout from the *Rice* decision could have. According to Tara Lulani Mckenzie, president and chief executive officer of Alu Like, Inc., the largest private nonprofit organization providing services and programs to Native Hawaiians, organizations like Alu Like could not provide their programs and services if it were not for federal support.[344] She stated that "Native Hawaiians are suffering from serious socioeconomic problems. They have overwhelming needs and few remedies."[345] In her opinion, the *Rice* decision set a precedent for future challenges to Native Hawaiian programs: "The *Rice v. Cayetano* decision set in motion a tragic situation which could have very serious implications for Native Hawaiians."[346] Retired federal magistrate Edward King agreed that the *Rice* decision has stripped away a "powerful tool for addressing the wrongs of the past and the consequent needs of the future."[347]

Ray Soon, chairman of the Hawaiian Homes Commission (HHC), also expressed his fears about the implications of the *Rice* decision:

> We fear for the people who are about to get on the land because they're not going to get that promise delivered. And we fear for the 30,000 Hawaiians who are on the land right now because their future is in doubt. But most of all, and I believe this is genuine, we fear mostly for the loss of the indigenous culture in the islands.[348]

Mr. Soon believes HHC was "right on the cusp" of securing much-needed housing benefits, particularly with the Native Hawaiian Housing Self-Determination Act pending before Congress.[349] However, given the current judicial and legal climate, all the progress made by HHC may be lost. Mr. Soon stated:

> The future looked bright until *Rice v. Cayetano* came along. That case casts a shadow of doubt over all Hawaiian programs, certainly over Hawaiian Homes. It would be painfully ironic if, just now, when Hawaiian Homes was beginning, and certainly just the beginning, of delivering on the promise of Congress back in 1920, we were declared unconstitutional because of the work of others before the Supreme Court.[350]

One panel of the Advisory Committee's 2000 forum dealt specifically with the legal implications of the *Rice* decision. Mahealani Kamau'u, executive director of the Native Hawaiian Legal Corporation, stated:

> In rendering its opinion, the High Court chose to apply the law as though entirely separate from the cultural, political, and economic context within which OHA's voting process was created. That context largely is the result of America's misdeeds and the Hawai'i electorate's desire to make amends.
>
> The Court appears to have been influenced by the increasingly dominant discourse of neo-conservatism, which has emphasized the need for strictly color-blind policies, calling for the repeal of special treatment such as affirmative action and other race-remedial policies.
>
> Under this doctrine, implicit assumptions regarding race include beliefs that any race consciousness is discrimination, that race is biological and thus a concept devoid of historical, cultural, or so-

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[343] David Helela statement, Forum 2000 Transcript, p. 220.

[344] Examples of Alu Like programs include early childhood and prenatal care, kupuna elderly health and nutrition services, at-risk youth programs, ex-offender programs, vocational education and training, literacy programs, and business training.

[345] Mckenzie statement, Forum 2000 Transcript, p. 39.

[346] Ibid.

[347] Edward King statement, Forum 2000 Transcript, p. 111.

[348] Soon statement, Forum 2000 Transcript, p. 164.

[349] Native American Housing Assistance and Self-Determination Amendments of 1999, S. 225, 106th Cong. (1999). The Hawaiian Homes Commission has asked Congress to extend to Native Hawaiians the same federal housing assistance programs that are available to Indians and Native Alaskans. Some of the provisions contained in S. 225 were subsequently enacted under the Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-569, tit. V, subtitle B, 114 Stat. 2944 (2000).

[350] Soon statement, Forum 2000 Transcript, p. 163.

> cial content, and that a group is either racial or it is not. And if it is racial, it cannot be characterized as political. This approach allows America to ignore its historical oppression of Native Hawaiians when meting out justice in its courts of law.[351]

According to Ms. Kamau'u, the Supreme Court has begun the process of eliminating the programs available to Native Hawaiians only in recent times, in particular the "exclusive means for expressing their collective and political will"—namely, the Office of Hawaiian Affairs. In her opinion, this negates the attempts to remedy past wrongs of the United States.[352]

One of the more difficult questions raised by the *Rice* discussion is whether the inherent right of self-determination should be viewed as a fundamental civil right. Bill Hoshijo, executive director of the Hawai'i Civil Rights Commission, stated that it is necessary to recognize that:

> Hawaiian rights issues are not civil rights issues within the framework that was applied by the United States Supreme Court in *Rice*. The issues involved are not issues of individual rights and equality under the law, but those of the inherent right of indigenous peoples to self-determination.[353]

The challenge lies in reconciling the concepts of civil rights and Hawaiian self-determination. According to Mr. Hoshijo, the *Rice* decision is part of a disturbing trend in which "hard-won civil rights protections are being subjected to constitutional attacks."[354]

The cause for alarm is justified. However, the *Rice* decision, by itself, may not be fatal to all Hawaiian programs. Panelist Robert Klein, former justice of the Hawai'i Supreme Court, reminded the assembly that the interpretation of *Rice* should be limited to the facts of the case and the law in question: voting rights under the 15th Amendment.[355]

Senator Daniel Akaka, in a written statement presented to the Hawaii Advisory Committee, observed that the *Rice* decision has no impact on federal programs addressing the conditions of Native Hawaiians. The Court merely ruled that OHA is a state agency and, as such, could not limit the election of its board of trustees to Native Hawaiians. Further, the ruling did not address the political relationship between Native Hawaiians and the United States, nor did it invalidate the federal programs that have been established to address the conditions of Native Hawaiians or declare OHA unconstitutional.[356] The decision has, however, had an impact on the Native Hawaiian community and has made it clear that the relationship between Native Hawaiians and the United States is an important matter.[357] Senator Akaka added:

> The *Rice* case does not directly impact the federal programs. Instead, the case has caused Native Hawaiians to come together to begin to resolve longstanding issues. Through addressing and resolving these matters, we will come together as a community and move forward together to provide a better future for the children of Hawai'i.[358]

Jon Van Dyke, professor of law, University of Hawai'i at Mānoa, agreed that the *Rice* decision is limited to the 15th Amendment, but warned that there are still dangers in the opinion because it focuses on what is and what is not racial discrimination, and it characterizes preferences for Native Hawaiians as racial discrimination.[359] He told the Committee:

> And so the mystery always is . . . why . . . cannot the Native Hawaiians . . . have the same rights to elect their own leaders that other native people have? And Justice Kennedy's answer was that it's because the Office of Hawaiian Affairs was not a quasi-sovereign entity, and that that was the defining difference between the Office of Hawaiian Affairs on the [other] . . . hand and the Navajo Nation or the Cherokee Nation or any other Indian nation.[360]

This comparison between Native Hawaiians and American Indians or other groups indigenous to North America was another recurring theme in the Advisory Committee's forum. It is interesting to note that there is a conflicting sentiment here: on one hand, Hawaiians reject the comparison to American Indians, stating that they are not a tribe; on the other hand, they compare themselves to American Indians to justify their right to self-determination. (Of course, there are Native Americans recognized by the federal government who were not actually members of "tribes" either.) However, some have argued that the Supreme Court rejected this comparison in its *Rice* decision, stating that neither the Constitution nor Congress has made it clear that Native Hawaiians are included in the references to indigenous people.[361] The Advisory Committee has reviewed the decision and concludes that the Court expressly left this question open.

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[351] Kamau'u statement, Forum 2000 Transcript, pp. 82–83.

[352] Ibid., p. 83.

[353] Hoshijo statement, Forum 2000 Transcript, p. 89.

[354] Ibid., pp. 89–90.

[355] Robert Klein statement, Forum 2000 Transcript, pp. 98–99.

[356] Akaka written statement, p. 1.

[357] Ibid., pp. 1–2.

[358] Ibid., p. 3.

[359] Van Dyke statement, Forum 2000 Transcript, p. 197.

[360] Ibid., pp. 197–98.

One of the main criticisms of the Supreme Court's majority opinion in *Rice* is that it failed to address the argument that Hawaiians have a standing similar to Native Americans, who have a political relationship with the federal government. As Mr. Hoshijo pointed out, the distinction between racial and political classifications is crucial.[362] The dissenting opinion of Justice Stevens, on the other hand, has been praised for its acknowledgment of Hawaiian history and the recognition of its importance to the current needs of Native Hawaiians. Justice Stevens noted the government's obligation to native peoples and rejected the distinction between Native Hawaiians and tribal Indians.

Despite the authority of the Supreme Court and the finality of its rulings, some believe that the Supreme Court decision will itself come under scrutiny. Mr. Hoshijo stated, "Yes, it's the law, but we can't abdicate our responsibility to critique the Court's analysis, to hold it up to the camera of public discourse and to condemn the unjust result." He pointed out that there have been many Supreme Court decisions in history that have come to be regarded later as civil rights disasters, and he is confident that the *Rice* decision will "similarly be condemned in historical hindsight."[363]

Perceived Victory: Support for the Rice *Decision*

Although the majority of the forum's participants voiced opposition to the Supreme Court's decision in *Rice v. Cayetano*, there were a few situated on the other end of the political and legal spectrum who expressed support for the ruling. Dr. Kenneth Conklin fervently opposes what he refers to as race-based entitlement programs, stating that there are other residents of Hawai'i who are in poverty, including Filipino, Japanese, Chinese, and Caucasian Americans who should also benefit from the available programs.[364] He further testified:

> Some have a topsy-turvy concept of civil rights saying that it violates the civil rights of Hawaiians when they cannot get preferential treatment, land, money, and political power based solely on race. I reject that upside-down logic. To grant such logic would grossly violate the civil rights of all the people of Hawai'i. . . .
>
> So it is clear what the long-term effects of the *Rice* decision will be upon racial entitlement programs. They are unconstitutional and will be abolished. This is not a bad thing. This is a good thing. It is good to reaffirm that all citizens of a democracy are equal under the law. It is good to reaffirm that government cannot discriminate either for or against people on account of race. It's called protecting civil rights.[365]

When asked whether the fact that the *Rice* decision was not unanimous was indicative that, even within the confines of the Supreme Court, there was some sentiment that the decision was wrong, Dr. Conklin responded that he regrets that it was only a 7 to 2 decision. He pointed out that throughout history there have been many significant decisions that were not unanimous, even 5 to 4, but they became, nonetheless, the law of the land.[366]

Another individual who spoke in favor of the *Rice* decision was William Burgess, a retired attorney and Hawai'i resident. He stated:

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[361] In the past, the Department of the Interior itself had taken the position that Native Hawaiians were not like other native peoples. Legal experts have praised the United States Solicitor General's brief filed in support of the Respondent State of Hawai'i in the *Rice* case. According to one speaker, this brief represented the first time the executive department of the United States supported the special trust relationship between Native Hawaiians and the federal government. Broder statement, Forum 2000 Transcript, pp. 149–50.

[362] Hoshijo statement, Forum 2000 Transcript, p. 91.

[363] Ibid., p. 93.

[364] Conklin statement, Forum 2000 Transcript, p. 51.

[365] Ibid., pp. 46–47.

[366] Ibid., p. 74.

> Under the U.S. Constitution, every individual citizen, every one of us, is entitled to equal protection of the laws without regard to race or ancestry. When the government allocates benefits based on race or ancestry, that discriminates against the rest of the citizens who are denied the right to share in those benefits.
>
> A great civil rights principle of American democracy is that government shall not engage in racial discrimination. That principle has been combined in Hawai'i with the aloha spirit and it's been embraced by Hawai'i to create a real-life working model for the whole world of how a diverse people can live together in relative harmony. The *Rice* decision doesn't diminish that principle. It enhances it.[367]

Mr. Burgess said that, rather than trying to circumvent the *Rice* decision, Hawaiians should use it to figure out ways to eliminate government discrimination in the allocation of benefits to one group (Native Hawaiians) over others. He contends that state funds and federal programs supporting Native Hawaiians are allocated based solely on the race or ancestry of the recipient, including some individuals who "have no need for . . . help with their health needs or education needs or housing needs."[368] He further contends that Hawaiians are not a distinct people in the way American Indians are because they do not live in separate tribal communities but rather are integrated with other peoples of the state by choice.

Opening the Door to Legal Challenges

The effect of the Supreme Court's decision in *Rice v. Cayetano* immediately provided a legal avenue for those who contend that Native Hawaiians have unjustly been the recipients of race-based preferences in the state of Hawai'i. In July 2000, several Hawai'i residents filed a complaint for a declaratory judgment and an injunction against the state in the United States District Court for the District of Hawai'i.[369] The plaintiffs in *Arakaki v. State of Hawaii* alleged that despite recent precedent in *Rice*, the Office of Hawaiian Affairs infringed upon their 14th and 15th Amendment rights by refusing to issue nomination forms to one of the plaintiffs, Kenneth Conklin, for election to OHA's board of trustees, solely because Mr. Conklin is not "Hawaiian" (as defined by Hawaii's statutory provisions).[370] In addition, the plaintiffs contended that OHA's existence and the state laws under which it operates are invalid.[371]

In a subsequent motion for summary judgment before the district court in September 2000, Judge Helen Gillmor ruled that pursuant to the Supreme Court's ruling in *Rice*, it can be assumed that the Constitution also prohibits racial discrimination in the selection of who may run for public office.[372] Specifically, it is unconstitutional for the Office of Hawaiian Affairs to limit its board of trustees to Native Hawaiians. In rendering its summary judgment in favor of the plaintiffs, the court stated:

> Neither Defendants nor OHA have explained why it is necessary that only Hawaiians serve as trustees. If the Court were to reach the question and find that the State co-opted a trust obligation to Hawaiians or that the State has a compelling interest in remedying past wrongs to Hawaiians, this Court does not accept the proposition that non-Hawaiians are unable to adequately serve that obligation as trustees.[373]

The district court subsequently ordered the state to permit otherwise qualified non-Native Hawaiians to run for office and, if elected, serve as trustees for OHA.[374] The *Arakaki* decision is currently on appeal before the United States Court of Appeals for the Ninth Circuit.[375]

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[367] Burgess statement, Forum 2000 Transcript, pp. 102–03.

[368] Ibid., p. 104.

[369] Arakaki v. State of Hawaii, Civ. No. 00-00514 HG-BMK (D. Haw. July 25, 2000) (Complaint for Declaratory Judgment and for an Injunction; Summons).

[370] *Id.* at 3, 6; *see* Hawai'i Public Radio, "The Anatomy of *Rice v. Cayetano*—A Radio Seminar: Comments," accessed at <http://www.hawaiipublicradio.org/radioseminar3.htm>. One *Arakaki* plaintiff, Kenneth Conklin, contended that *Rice* has cast constitutional doubt on all Hawaiian programs.

[371] *Id.* at 3 n.1

[372] Arakaki v. State of Hawaii, Civ. No. 00-00514 HG-BMK (D. Haw. Sept. 19, 2000) (Order Granting Plaintiffs' Motion for Summary Judgment).

[373] *Id.* at 19–20.

[374] In the aftermath of the *Rice* decision, Governor Cayetano declared his intention to replace the elected trustees with appointees of his own choosing. OHA disagreed, and on Mar. 30, 2000, submitted the dispute to the Supreme Court of Hawai'i for resolution. In Office of Hawaiian Affairs v. Cayetano, 94 Hawai'i 1, 6 P.3d 799 (2000), the court held that the *Rice* decision transformed the sitting trustees' status from *de jure* to *de facto* but did not create any immediate OHA vacancies. *Id.* at 8, 6 P.3d at 806. The court deferred judgment, however, on the question whether the trustees should remain in office, stating that the more appropriate procedure would be for the state to file a quo warranto petition. *Id.* at 8–9, P.3d at 806–07.

As with *Rice*, the *Arakaki* decision evoked strong emotion among Native Hawaiians and their supporters. Before the Hawaii Advisory Committee, Judge Klein described the possible effect of *Arakaki*:

> [*Arakaki*] is a slam-dunk case from the standpoint of—if you allow the courts to utilize the traditional constitutional paradigm in determining whether statutes, which discriminate on their face, can only be upheld if there is a clear compelling state interest and another means of exonerating the statute in a narrowly tailored way cannot be found. If you utilize that paradigm, as was done in *Rice v. Cayetano*, to measure practically any . . . of these programs under typical constitutional analysis, they're all in jeopardy, because two of the major determinations made in *Rice v. Cayetano* that are harmful in legal analysis are, number one, the discrimination was based on race; number two, that OHA was a state office. Those two principal foundations to the *Rice v. Cayetano* decision color any future legal cases challenging any state/federal programs, be they statutory, be they constitutional rights in nature, or even Hawai'i Supreme Court decisions favoring the rights of Hawaiians, all can be challenged using the traditional paradigm.[376]

Ms. Kamau'u expressed her fear that the federal district court has "explicitly expanded its constitutional reach to lay bare and cement the legal foundation upon which all Native Hawaiian preference programs may now be challenged and scrutinized under a stricter standard of legal review."[377] She added:

> The government must now show that a law which allows the native preference is narrowly tailored to achieving a compelling state interest. Native Hawaiian programs would have difficulty meeting this strict scrutiny test in the best of times, but the High Court's recent inclination to turn a blind eye to the larger context—the historic, cultural, social, and political oppression suffered by Native Hawaiians for over a century at the hands of America—portends disaster.[378]

These fears of repercussions from the *Rice* and *Arakaki* decisions appear to have been warranted. In October 2000, two additional lawsuits were filed challenging Native Hawaiian programs.[379] The plaintiff in *Carroll v. Nakatani* has challenged the Office of Hawaiian Affairs' income and revenue stream. The plaintiff in *Barrett v. State* makes a broader challenge to the constitutionality of OHA, the Department of Hawaiian Home Lands, and Native Hawaiian gathering rights. These cases were subsequently consolidated, and will be presided over by Chief Judge Ezra.

In May 2001, a discrimination complaint was filed with the U.S. Department of Education's Office for Civil Rights against Kamehameha Schools. The trustees of Kamehameha Schools—a perpetual, private, charitable trust established by Princess Bernice Pauahi Bishop in 1884—have responded to similar allegations in the past by stating that children of all racial or ethnic backgrounds are admitted, provided that they have at least one Hawaiian ancestor. Although Harold Rice's attorney, John Goemans, dropped a 1997 lawsuit against the Internal Revenue Service making similar allegations, the IRS nevertheless reviewed its 1975 position that Kamehameha Schools' policy was not discriminatory

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With the deadline for declaring one's candidacy under the 2000 election looming, all nine Native Hawaiian trustees (including an individual previously appointed by Cayetano to fill a vacant seat) resigned from office in an act of solidarity. Pat Omandam, "OHA trustees resign," *The Honolulu Star-Bulletin*, Sept. 8, 2000, accessed at <http://starbulletin.com/2000/09/08/news/index.html>. Rather than risk the possibility of having a majority of the board appointed by the governor for two years until the 2002 election (i.e., if a subsequent quo warranto petition were decided in the state's favor), the trustees decided to seek reelection in 2000. Ibid. Native Hawaiians protested Cayetano's subsequent interim appointments, expressing concerns about pending multimillion dollar claims against the state relating to revenues from the ceded lands trust revenues allegedly owed to OHA. Pat Omandam, "Some are protesting Cayetano's appointments to OHA board," *The Honolulu Star-Bulletin*, Sept. 12, 2000, accessed at <http://starbulletin.com/2000/09/12/news/index.html>. In the 2000 election, Charles Ota, a non-Native Hawaiian, was elected to one of the abandoned seats (four out of the nine former trustees were voted out of office).

[375] Arakaki v. State, No. 00-17213 (9th Cir.) (notice of appeal filed Oct. 27, 2000). The state filed its opening brief on Feb. 26, 2001. Arakaki, et al. filed their answering brief on Apr. 9, 2001. The Pacific Legal Foundation filed an *amicus curiae* brief.

[376] Klein statement, Forum 2000 Transcript, pp. 99–100.

[377] Kamau'u statement, Forum 2000 Transcript, p. 84.

[378] Ibid., pp. 84–85.

[379] *See* Carroll v. Nakatani, Civ. No. 00-00641-SPK (D. Haw. Oct. 2, 2000); Barrett v. State, Civ. No. 00-00645-DAE (D. Haw. Oct. 3, 2000).

and, in 1999, reaffirmed the estate's tax-exempt status.[380]

RECOGNITION LEGISLATION BEFORE CONGRESS: A SAFE HARBOR?

Native Hawaiians are in a grassroots political struggle to regain control over Hawaiian lands and to establish the right of self-governance. The desire for recognition as a distinct indigenous people has resonated across the islands and in Congress. In light of the *Rice* decision, there is a sense of urgency to establish a procedure for formal recognition of a political entity representing Native Hawaiians,[381] and protect existing federal and state programs from future legal challenges. In July 2000 and again in January and April 2001, Hawai'i Senator Daniel Akaka proposed legislation that would recognize Native Hawaiians as aboriginal, indigenous, native people, with whom the United States had (and still has) a unique political and legal relationship.[382]

In short, the proposed legislation would establish a "process for the recognition by the United States of a Native Hawaiian governing entity for purposes of continuing a government-to-government relationship."[383] In broad terms, the new government's potential power would be to negotiate with the U.S. government, protect Native Hawaiian civil rights, and consent to all property agreements.[384] A United States Office for Native Hawaiian Relations will be established in the Department of the Interior to, among other things, "effectuate and coordinate the trust relationship between the Native American people and the United States . . . and with all other Federal agencies . . . [both prior to and upon recognition by the United States]."[385] A Native Hawaiian Interagency Coordinating Group will also be created with appointments to be made by the President from each federal agency that implements policies that affect Native Hawaiians.[386]

Senator Akaka's written statement explained the genesis of this legislation and how it was developed strategically in response to the *Rice* decision:

> While the *Rice* case has impacted the timing of the legislation to clarify the political relationship between Native Hawaiians and the United States, this issue has been . . . [under] discussion for many, many years within the Native Hawaiian community, the State of Hawai'i, and the federal government. I believe this issue would have been addressed by legislation as part of the reconciliation process.[387]

What do Native Hawaiians expect to obtain through the recognition bill? To many, the legislation is about control: who has the right to control Hawaiian homelands and other entitlements.[388] Senator Akaka explained what he hopes the legislation will accomplish:

> This legislation provides tremendous opportunity for the Native Hawaiian community to come together to begin to resolve long-standing issues. It provides the opportunity for Native Hawaiians to have a seat at the table with respect to federal policies impacting them. It provides the opportunity for Native Hawaiians to begin to exercise their rights as native people to self-governance.
>
> This legislation is also important to non-Native Hawaiians because it provides a process to resolve

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[380] Yasmin Anwar, " 'Hawaiian only' rule by school under fire," *The Honolulu Advertiser*, May 26, 2001, pp. B1, B2. *See also* <http://the.honoluluadvertiser.com/article/2001/May/26/ln/ln07a.html>.

[381] Broder statement, Forum 2000 Transcript, pp. 154–55.

[382] Recognition Legislation, S. 2899, 106th Cong., 2d Sess. (2000); *see generally* S. REP. NO. 106-424 (2000). The 2000 Recognition Legislation passed in the House of Representatives, but was not acted upon by the full Senate. Senator Akaka reintroduced an identical bill, S. 81, with original co-sponsor Senator Inouye on Jan. 22, 2001. Recognition Legislation, S. 81, 107th Cong., 1st Sess. (2001). Representative Neil Abercrombie introduced the House bill, H.R. 617, on Feb. 14, 2001 with co-sponsors Representative Patsy Mink and a group of bipartisan representatives. Senator Akaka subsequently introduced a modified version of the bill on Apr. 6, 2001. Recognition Legislation, S. 746, 107th Cong., 1st Sess. (2001).

[383] Recognition Legislation, S. 746, 107th Cong., 1st Sess., § 3(b) (2001). *See also id.* at § 1(22)(c).

[384] *Id.* at §§ 6(b)(2)(A)(iv), 6(b)(2)(A)(v), 6(b)(2)(A)(vi). *See also* Deidre Davidson, "Seeking Sovereignty, Island Style," *Legal Times*, Oct. 20, 2000, p. 1.

[385] Recognition Legislation, S. 746, 107th Cong., 1st Sess., § 4(b)(1). The office is also charged with continuing the reconciliation process both prior and subsequent to recognition; undertaking meaningful consultation as to actions that may significantly affect Native Hawaiian resources, rights, or lands; and preparing reports to Congress. *Id.* at §§ 4(b)(1)–(5).

[386] Recognition Legislation, S. 746, 107th Cong., 1st Sess., § 5. *See also* Haelani Waiwaiole, "A Review of the Akaka Native Hawaiian Bill," *The Hawaiian News*, August 2000, p. 11.

[387] Akaka written statement, p. 1.

[388] Davidson, "Seeking Sovereignty, Island Style."

> long-standing issues that have concerned Hawaiians for many, many years.[389]

Forum panelists and members of the public offered opposing views on the necessity and viability of the legislation proposed by Senator Akaka, reflecting the heated debate the bill has sparked across Hawai'i. Many would argue that disagreement is to be expected given the nature of the issues, which involve deeply rooted feelings of betrayal and entitlement. Clayton Hee, chairman of the Office of Hawaiian Affairs (at the time), characterized the disagreement over the Akaka bill as follows:

> [W]e live in a democracy, number one, and like other people, . . . not everyone agrees on everything at the same time. So it should not be either surprising or difficult to understand that, on legislation which will reshape the history of people, unanimity is not achieved.[390]

The Silver Lining: Support for the Proposed Legislation

The Department of the Interior and the Department of Justice, in their October 2000 report, found that the *Rice* decision should not stand as an obstacle to the federal government's efforts to promote reconciliation with Native Hawaiians. The departments also believed that the *Rice* decision "highlights the importance of legislation to provide a statutory basis for a government-to-government relationship with Native Hawaiians as indigenous, aboriginal people."[391]

Among participants in the 2000 Advisory Committee forum who provided written and/or oral testimony, there appeared to be more support for, than opposition to, Senator Akaka's recognition legislation. Based on his participation in hearings on the bill, Clayton Hee agreed:

> [I]t's my own view that if one were to base conclusions . . . [before] the federal hearings on the Committee of Indian Affairs, which was conducted recently, it's my own conclusion that the support far outweighed the dissent.[392]

Ray Soon, chairman of the Hawaiian Homes Commission, added that "the disagreement is over process" and not the final outcome, which is the desire for self-governance and self-determination.[393]

Tara Lulani Mckenzie, president and chief executive officer of Alu Like, Inc., supported Senator Akaka's recognition legislation as having the potential to protect existing programs and resolve longstanding issues facing Native Hawaiians such as political status and self-determination. She stated:

> This is only a very baby beginning step, but it is a step, and I don't believe in any way that it jeopardizes the rights to pursue independence in a different venue, which is the international arena. . . . This is a significant step for Native Hawaiians, but there is a lot of work still to be done.[394]

According to Mahealani Kamau'u, executive director of the Native Hawaiian Legal Corporation:

> The federal recognition bill now before Congress, which confirms the existence of a political relationship between the United States and Native Hawaiians, possibly recasting our status from a racial classification in such a manner as to escape the pernicious application of constitutional law devoid of contextual conscience, offers some promise.[395]

Former Hawai'i Supreme Court Justice Robert Klein stated that the *Rice* decision galvanized Native Hawaiian communities' efforts to obtain formal recognition from Congress. Mr. Klein is optimistic that the Akaka bill will remedy some of the problems faced by Native Hawaiians because they will become a quasi-sovereign nation. Native Hawaiians will then be able to deal with the government on the same level as American Indians and Alaska Natives, and "favorable programs can continue without having the persistent invasive legal actions being taken against them to disassemble them."[396]

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[389] Akaka written statement, p. 3.

[390] Clayton Hee statement, Forum 2000 Transcript, p. 165; *see also* Aranza statement, Forum 1998 Transcript, vol. 2, p. 220 (calling "the diversity of opinion and perspective" a strength and observing that "all are united in the common objective, that something must be done").

[391] Departments of the Interior and Justice, Reconciliation Report, p. 50.

[392] Hee statement, Forum 2000 Transcript, pp. 165–66.

[393] Soon statement, Forum 2000 Transcript, p. 166.

[394] Mckenzie statement, Forum 2000 Transcript, p. 41.

[395] Kamau'u statement, Forum 2000 Transcript, p. 87.

Former federal magistrate Edward King also supported the Akaka bill as "an absolutely essential requirement in order to establish the notion of the trust, to bring in congressional action, and to allow the state to move in a way the majority of these people intend."[397]

Sherry Broder, attorney for the Office of Hawaiian Affairs, argued that federal recognition of Native Hawaiians is justified based on the fact that there are 557 federally recognized tribes in the United States.[398] Formal recognition of Native Hawaiians, therefore, is "well within the power of Congress and well within the tradition and history of the United States."[399]

Dr. Peter Hanohano compared the current legislative situation in the United States with Canada's situation. The Canadian Charter of Rights and Freedoms provides in pertinent part:

> Subsection 1 does not preclude any law, program, or activity that has as its object, the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age, or mental or physical disability.[400]

In Dr. Hanohano's opinion, the United States could learn from Canada's example.

The proposed Akaka legislation derives, in part, from Native Hawaiian petitions in the international arena. Absent the passage of the legislation by Congress, Native Hawaiians will have no recourse but to state their claims in the international arena. However, some Native Hawaiians fear passage of the Akaka bill would thwart the ability of Hawaiians to claim sovereignty and seek international justice. Professor Jon Van Dyke disputed this latter point by citing section 10 of the Akaka bill, which states, "Nothing in this act is intended to serve as a settlement of any claims against the United States or to affect the rights of the Native Hawaiian people under international law."[401] Professor Van Dyke added:

> [I]t's very clear that the rights of the Native Hawaiian people, and they certainly have such rights under international law, are fully protected and preserved by this bill. The bill, in my judgment would facilitate the process of addressing those issues because it would allow the native people to have a voice through the Native Hawaiian government.[402]

In summary, the Akaka bill could be the silver lining for those who fear the *Rice* decision will weaken the political, social, and cultural status of Native Hawaiians. Ms. Mckenzie acknowledged that the *Rice* decision could have a major impact on programs for the betterment of conditions for Native Hawaiians, but she is confident that the realization of self-determination through the Akaka bill raises the potential for Native Hawaiian control over resources and lands, education systems, health and government issues, economic destiny, and preservation of culture and language. State Representative Sol Kahoʻohalahala captured this sentiment in the following statement:

> I have great faith that the State of Hawaiʻi will one day realize that what is good for Hawaiians is good for the whole state, to realize that greater self-determination for Hawaiians means less responsibility for the state, greater Hawaiian control in Hawaiian affairs means less mistakes in solutions for Hawaiians and less liability for the state, and when justice is served for Hawaiians, it is a victory for all.[403]

An Unfit Solution: Opposition to the Proposed Legislation

Opponents of the Akaka bill are fervent in their belief that it constitutes a selfish attempt to perpetuate racial entitlement programs threatened by the *Rice* decision and an attempt to overrule the Supreme Court.[404] They also contend that any reparations due to Hawai'i as a result of the island's overthrow and annexation are due to all descendants of island residents at that time and not just Native Hawaiians.[405] There are Native Hawaiians who also disagree with the Akaka bill, viewing it as yet another attempt of the U.S. government to minimize the rights of Native Hawaiian people and infringe upon their traditional beliefs. Some contend that the Kingdom of Hawaii is still a legal entity today, and the Akaka bill is further evidence of the illegal occupation of Hawai'i.[406]

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[396] Klein statement, Forum 2000 Transcript, p. 101.

[397] King statement, Forum 2000 Transcript, p. 115.

[398] Broder statement, Forum 2000 Transcript, pp. 152–53.

[399] Ibid.

[400] Hanohano statement, Forum 2000 Transcript, pp. 23–24.

[401] Van Dyke statement, Forum 2000 Transcript, p. 205 (citing Recognition Legislation, S. 2899, 106th Cong., 2d Sess., § 10 (2000)). *See also* Recognition Legislation, S. 746, 107th Cong., 1st Sess., § 8(b) (2001); Recognition Legislation, S. 81, 107th Cong., 1st Sess., § 10 (2001) (adding that the act is not intended "to affect the rights of the Native Hawaiian people under international law").

[402] Van Dyke statement, Forum 2000 Transcript, pp. 205–06.

[403] Sol Kaho'ohalahala statement, Forum 2000 Transcript, p 191.

One of the main criticisms of the Akaka bill is that it is "top-down" legislation—i.e., the people who will be most directly affected by its provisions did not have input during its development. Others criticize the legislation as being inconsistent with the beliefs and rights of the Native Hawaiian people. For example, Dr. Richard Kekuni Akana Blaisdell, a physician and professor of medicine at the University of Hawai'i, opposed the bill because:

> its process and its product is a gross violation of our Kānaka Maoli inherent sovereignty and right to self-determination. And we feel that there is sufficient evidence in the American law already existing to protect current federal and other government programs providing funds for our people, such as in health.[407]

Senator Akaka's written statement noted, however, that the Native Hawaiian community did have the opportunity to provide input in the development of the legislation. Five working groups were formed throughout the state: the Native Hawaiian Community Working Group, the State Working Group, the Federal Officials Working Group, the Native American and Constitutional Scholars Working Group, and the Congressional Members and Caucuses Working Group.[408] Ms. Mckenzie further challenged the notion that the Akaka bill did not have input from the Native Hawaiian community. She participated in the Native Hawaiian Community Working Group, which held meetings statewide to discuss the bill and solicit input.[409]

Sondra Field-Grace, a local activist, characterized the bill as "an outrage that goes beyond any violation of our civil rights."[410] She questioned the manner in which the hearings on the bill were conducted and contends that some of the hearings concerning the bill were canceled because there was strong opposition to the bill. She argued further that the bill had been "rushed through the Congress with testimonies of only people who are in favor of the bill" and petitioned the U.S. Commission on Civil Rights to take up the matter. She told the Advisory Committee:

> The manipulation and outright lies of the Hawai'i congressional representatives and the manufactured consent of the media on the Akaka bill must be taken up by this Commission. Your stated role as an independent bipartisan fact-finding agency of the federal executive branch may be the opportunity to get . . . [the President] to veto this bill and call for an independent investigation of the Hawai'i congressional representatives and the Justice and Interior Departments. You can play the role that the Blount Report did for President Cleveland, but you must move quickly. The civil rights of an entire nation are on the chopping block. You cannot plead ignorance. The facts are there for all the world to see.[411]

Those who support the *Rice* decision are typically opposed to the Akaka legislation. Dr. Kenneth Conklin stated that the bill would represent the first time in history that Congress would "recognize a political entity that never existed, get people to sign up, allow it to invent its own membership rules as it goes along, and then negotiate with it over money, land, and power."[412] The Hawaii Advisory Committee notes, however, that the history of the Indian Reorganization Act indicates otherwise.

Although she supports the Akaka bill, Tara Lulani Mckenzie, president and chief executive officer of Alu Like, Inc., was asked to describe what she perceives as the downsides to its passage. First, she fears that Native Hawaiian communities may be further divided by the bill, resulting in friction between the bill's supporters and opponents. Second, the bill might create friction between Native Hawaiians and other native people regarding existing programs for Native American and Native Alaskan "Indians."[413] While she recognized that the bill was patterned after many Native American efforts, she thought it was important to emphasize that Native Hawaiians are distinct people with distinct needs. Finally, Ms. Mckenzie indicated that the actual implementation of the bill's provisions and the efforts required to develop interim programs could pose additional problems.[414]

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[404] Kenneth R. Conklin, "Major Points in Opposition to the Akaka Bill Explained in Detail," accessed at <http://www.angelfire.com/hi2/hawaiiansovereignty/AkakaWrong.html>.

[405] Ibid.

[406] Waiwaiole, "A Review of the Akaka Native Hawaiian Bill."

[407] Blaisdell statement, Forum 2000 Transcript, p. 20.

[408] Akaka written statement, p. 2.

[409] Mckenzie statement, Forum 2000 Transcript, pp. 59–60.

[410] Field-Grace statement, Forum 2000 Transcript, p. 217.

[411] Ibid., pp. 218–19.

[412] Conklin statement, Forum 2000 Transcript, pp. 47–48.

CONCLUSIONS AND RECOMMENDATIONS

The Hawaii Advisory Committee issues this report on the basis of the record from its 1998 and 2000 community forums. The Advisory Committee has examined the record and fully considered the views of all parties submitting testimony. As a result of the testimony provided at these meetings, the Hawaii Advisory Committee now recognizes an even greater urgency in the circumstances faced by Native Hawaiians. Absent explicit federal recognition of a Native Hawaiian governing entity, or at least a process for ultimate recognition thereof, it is clear that the civil and political rights of Native Hawaiians will continue to erode.

The current political crisis represents an opportunity to clarify longstanding issues that have served as obstacles to the resolution of claims against the federal and state governments. Because of recent judicial and legislative developments, the Native Hawaiian civil rights movement is rapidly gaining momentum. Although the *Rice* decision is limited to the 15th Amendment, many Native Hawaiians perceive it as a threat to existing federal and state programs established to better their economic and social conditions. Observers have referred to the *Rice* decision as a wake-up call to Native Hawaiians, encouraging them to unite in an effort to address political challenges to their continued ability to maintain their cultural identity. The Hawaii Advisory Committee concludes that precautionary steps must be taken to secure the rights of Native Hawaiians.

Therefore, the Advisory Committee strongly recommends implementation of the following actions to uphold the civil rights of Native Hawaiians and facilitate the process of reconciliation with the United States in the aftermath of the illegal overthrow of the Hawaiian Kingdom in 1893:

1. The federal government should accelerate efforts to formalize the political relationship between Native Hawaiians and the United States.

This recommendation can be accomplished through the formal and direct recognition by Congress of the United States' responsibilities toward Native Hawaiians, by virtue of the unique political history between the United States and the former Kingdom of Hawaii. If necessary, the federal government should provide financial assistance to facilitate mechanisms for the establishment of a sovereign Hawaiian entity, under guidance from leaders of the Native Hawaiian self-determination effort and in consultation with Native American and Native Alaskan leaders who have faced similar challenges. The Hawaii Advisory Committee considers the denial of Native Hawaiian self-determination and self-governance to be a serious erosion of this group's equal protection and human rights. Therefore, the Advisory Committee requests that the U.S. Commission on Civil Rights urge Congress to pass legislation formally recognizing the political status of Native Hawaiians.

The history of the Hawaiian nation has many parallels to the experiences of Native Americans. There is no rational or historical reason, much less a compelling state interest, to justify the federal government denying Hawaiians a process that could entitle them to establish a government-to-government relationship with the United States. That process is currently available to Native Americans under the Indian Commerce Clause of Article I, Section 8, Clause 3 of the U.S. Constitution.

The Supreme Court observed that "whether Congress may treat the native Hawaiians as it does the Indian tribes" is a matter of some dispute, citing scholarly articles by professors Jon

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[413] *But see* Recognition Legislation, S. 746, 107th Cong., 1st Sess., § 9(b) (2001) ("Nothing contained in this Act shall be construed as an authorization for eligibility to participate in any programs and services provided by the Bureau of Indian Affairs for any persons not otherwise eligible for such programs or services").

[414] Mckenzie statement, Forum 2000 Transcript, pp. 60–61.

Van Dyke and Stuart Minor Benjamin.[415] Members of the Hawaii Advisory Committee have analyzed both articles and find Van Dyke's argument to be more persuasive.[416]

The benefits afforded to Native Americans under their status as recognized tribes who have a political relationship with the United States—which Native Hawaiians do not have full access to—include the ability to manage the resources and lands under their control. Hawaiians have no direct control of such assets. Other benefits of formal political status include:

- the ability to seek federal funding for housing assistance
- the ability to sue the federal government for breaches of trust
- the right to place native children in a culturally appropriate environment
- the ability to promote their economic opportunities through favorable tax treatment of ventures within their jurisdiction

Native Hawaiians should not be precluded from qualifying as a distinct political class of people, like Native Americans and Native Alaskans. The history of the indigenous Hawaiian people is in many ways analogous to the history of Native Americans and Native Alaskans. Over 150 statutes have been enacted for their benefit. It is, therefore, clear that Native Hawaiians have a historical and special relationship with the federal government.

Furthermore, largely because of their status as an aboriginal people, Hawaiians retain special property rights unlike any other native people in America that have been perpetuated since the creation of private property rights in Hawai'i at the time of the Māhele. The Māhele was a land division authorized by Kamehameha III in 1848 to distribute fee-simple title to private parties for the first time in the history of these islands. However, these new rights were subject to retained rights of native people to continue the traditional gathering, cultivation, and worship on those lands that was basic to the Hawaiian culture. Each subsequent government after the overthrow of the kingdom respected and affirmed these rights until the present.

The Hawai'i Supreme Court, interpreting these rights, has held that all public agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.[417]

2. The federal government should implement the recommendations made by the Department of the Interior and Department of Justice in their October 2000 report on the Reconciliation Process between the Federal Government and Native Hawaiians.

A report released by the Department of the Interior and the Department of Justice in October 2000 jointly recommended:

- Native Hawaiians should have self-determination over their own affairs within the framework of federal law as do Native American tribes.
- Congress should enact further legislation to clarify Native Hawaiians' political status and create a framework for recognizing a government-to-government relationship.
- An office should be established within the Department of the Interior to address Native Hawaiian issues.
- The Department of Justice should assign the Office of Tribal Justice on an ongoing basis to maintain a dialogue with Native Hawaiians.
- A Native Hawaiian Advisory Commission should be established to consult with all bureaus within the Department of the Interior regarding lands management and resource and cultural issues affecting Native Hawaiians.

Whether or not Congress eventually adopts recognition legislation, the executive branch should pursue all measures within its power to effectuate reconciliation with Native Hawaiians. Further delays are not acceptable. The federal and state governments must break the cycle of promises made to the Native Hawaiian people, only to be broken thereafter. The Hawaii Advisory Committee concludes that true reconciliation between Native Hawaiians and the United States can serve as both a reaffirmation of the democratic ideals upon which our nation was founded and a worthy example of peaceful dispute resolution for the international community.

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[415] *Rice*, 120 S. Ct. at 1057–58.

[416] *See* Philip P. Frickey, "Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law," *Harvard Law Review*, vol. 110 (1997), p. 1764 (suggesting that Professor Benjamin's analysis is analogous to the Wizard of Oz telling the reader to pay no attention to what is behind the curtain); ibid., p. 1757 ("unless injected with a heavy dose of historical perspective and legal realism, formal lawyerly analysis not only often fails to illuminate the issues in federal Indian law, but can also result in deceiving conclusions").

[417] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), *cert. denied*, 517 U.S. 1163 (1996); HAW. CONST. art. XII, § 7. These property rights, although unique in the nation, are nevertheless rights for which Hawaiians can demand protection.

3. Diverse viewpoints among Native Hawaiians should be respected.

Diverse viewpoints are valued in American democracy and should be respected when displayed among Native Hawaiians. The U.S. government should acknowledge that it bears some responsibility for fostering this perceived division. The Hawaii Advisory Committee concludes that Native Hawaiian communities are in fact united in their desire for action to address the wrongs that have been committed against them. Although some Native Hawaiians do not agree with the proposed recognition legislation currently pending before Congress, including those who want to achieve independent nationhood status, the Advisory Committee is convinced that the legislation as currently worded would not preclude them from pursuing matters in the international arena. To the extent that disagreements are perceived within the Native Hawaiian community regarding the proper form that a Hawaiian sovereign entity should take, they must not serve as barriers to the implementation of reconciliation efforts by the United States.

4. International solutions should be explored as alternatives to the recognition of a Native Hawaiian governing entity.

The Hawaii Advisory Committee recognizes that the sentiment for an international resolution to restore a sovereign Hawaiian entity is beyond the immediate scope and power of the U.S. Commission on Civil Rights. Nevertheless, that limitation does not preclude the United States from exploring such alternatives as a part of the reconciliation process that the United States committed to pursue in the 1993 Apology Resolution. In order to make this process truly meaningful, the federal government should engage in a dialogue with Hawaiian leaders to examine the issues surrounding as wide a variety of options for reconciliation as possible.

The principles of self-determination and self-governance—which are consistent with the democratic ideals upon which our nation is founded—can only be meaningful if Native Hawaiians have the freedom to examine diverse options for exercising the sovereignty that they have "never directly relinquished."[418] Accordingly, the United States should give due consideration to re-inscribing Hawai'i on the United Nations' list of non-self-governing territories, among other possibilities. Our nation's experiment in democracy will gain credence (and, therefore, influence) with members of the international community to the extent that we are able to fully embrace the ideal that motivated this country's founding fathers: consent of the governed.

The Hawaii Advisory Committee is fully cognizant of the concern expressed by some that international resolution would necessarily involve secession, a drastic endeavor over which this nation purportedly fought a civil war. However, this view ignores the troubled and racist roots of our nation's history. The Civil War was at its core a conflict over the issue of slavery. Moreover, the Civil War Amendments and Civil Rights Acts, upon which the plaintiff in *Rice* based his claims, were supposed to effect a reconstruction of American society through equality for African Americans. Tragically, this promise, like the promises made by the United States to its indigenous people, was broken.[419]

The principle of self-determination necessarily contemplates the potential choice of forms of governance that may not be authorized by existing domestic law.[420] Whether such a structure is politically or legally possible under the law is secondary, however, to the expression of one's desire for self-determination. The important proposition is that those who would choose to swear their allegiance to a restored sovereign Hawaiian entity be given that choice after a full and free debate with those who might prefer some form of association with the United States (including, perhaps, the status quo).

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[418] Apology Resolution, S.J. Res. 19, 103d Cong., Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993).

[419] *See generally* Eric K. Yamamoto, et al., "Dismantling Civil Rights: Multiracial Resistance and Reconstruction," *Cumberland Law Review*, vol. 31 (2001). The article suggests further that we are in the midst of a dismantling of the Second Reconstruction, which came to being as a result of the civil rights movement of the 1950s and 1960s.

[420] In Texas v. White, 74 U.S. 700 (1868), the Court appears to have suggested that the otherwise indestructible Union nevertheless contemplates the *possibility*, however remote that may be, that the other states could give their consent to the withdrawal of a sister state. *Id.* at 725 ("The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revoca-

In modern history, Hawaiians have demonstrated an enviable capacity for peaceful discourse and nonviolence. The United States should respect that political maturity and allow for conditions that will give Native Hawaiians the full opportunity to express their desires for self-determination. If necessary, that process should engage respected international observers who could help fashion a unique solution that suits the political needs of Hawaiians.

Those supervising the reconciliation process should provide for an open, free, and democratic plebiscite on all potential options by which Native Hawaiians might express their inherent right to self-determination. The process should allow for international oversight by nonaligned observers of international repute. After a period for organization of that government, the federal government should engage in negotiations with the sovereign Hawaiian entity. The Hawaii Advisory Committee believes that these deliberations should take into consideration and protect, or otherwise accommodate, the rights of non-Native Hawaiians. Thereafter, the federal government should provide financial assistance for the educational effort that may be necessary to reconcile conflicts raised by the choices made by Native Hawaiians. If necessary, the United States should engage in continuing negotiations to seek resolution of any outstanding issues with the sovereign Hawaiian entity.

5. Administrative rules and policies to support the principles of self-determination should be adopted pending formal recognition of a sovereign Hawaiian entity.

The Hawaii Advisory Committee is aware that the process for recognizing a Native Hawaiian governing entity will take some time. Therefore, it is vitally important that appropriate steps be taken to ensure the betterment of conditions for Native Hawaiians in the interim. For example:

- convening regularly scheduled policy discussions with Native Hawaiians, in Hawai'i, to identify emerging issues relating to reconciliation efforts under the Apology Resolution
- granting Native Hawaiians and Native Hawaiian organizations the right to contract with federal agencies to assume programmatic responsibility for implementing and administering federal legislation adopted for their benefit[421]
- meeting with Native Hawaiian political leaders and representatives of the State of Hawai'i, in Hawai'i, to review options for restoring nationhood to Native Hawaiians, including models for establishing a government-to-government relationship other than the political structure created for Indian tribes and Alaskan Native villages (commonwealth, federation, etc.)
- establishing an escrow account for the benefit of the eventual sovereign Hawaiian entity, into which the United States and the State of Hawai'i shall begin to make payments for its use of ceded lands

The Hawaii Advisory Committee, therefore, urges the appointment of a Special Advisor for Indigenous Peoples to the Domestic Policy Council at the White House. The special advisor would coordinate the flow of information and recommendations from all federal and state agencies dealing with indigenous rights, including all Native Hawaiian issues and concerns, to the White House.

The special advisor should also establish formal liaisons with other agency officials having responsibilities affecting Native Hawaiians, including an office located in Hawai'i to promote direct communication with Native Hawaiians. Another possibility is the formal establishment of an Interagency Coordinating Group, as contemplated by S. 746 (2001) currently pending before Congress. In whatever form it takes, this coordinating effort should involve regular, periodic reviews of each agency official and an an-

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tion, *except* through revolution, or *through consent of the States*.") (emphasis added).

[421] The Advisory Committee believes that permitting the assumption of programmatic responsibility for congressional initiatives designed to benefit Native Hawaiians will promote self-determination and self-governance.

nual public report of relevant actions and accomplishments.

The Apology Resolution acknowledges that the United States acquired nearly two million acres of ceded lands from the Republic of Hawaii "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." As a result, at least a moral, if not a legal, obligation exists relating to the ongoing use of these lands. The Advisory Committee does not believe that benefits currently afforded to Native Hawaiians amount to adequate compensation for the adverse effects of the illegal overthrow upon them or otherwise justify continued use of these valuable resources without compensation. Other alleged abuses, including the transfer of ceded lands, should also be addressed, but a comprehensive inventory must be undertaken while the recognition process is moving forward in order to properly assess and account for such uses of these former lands of the Kingdom of Hawaii.[422]

6. Regular evaluations should be conducted of federal and state programs for the benefit of Native Hawaiians.

A common, and recurring, complaint heard by the Hawaii Advisory Committee over the past two decades is that poor management has resulted in inadequate distribution of the benefits earmarked for Native Hawaiians. Programs for Native Hawaiians, whether established by the State of Hawai'i (such as the Office of Hawaiian Affairs and the Hawaiian Homes Commission) or through congressional enactment, should be evaluated on a regular basis by a team of local, state, and federal officials, including a delegation of Native Hawaiians, to determine if they are adequately carrying out their missions. Appropriate performance measures should be put in place to determine if the programs are doing what they were established to do, i.e., improve the conditions of Native Hawaiians. The Department of the Interior should provide technical assistance as needed to ensure that the responsibilities of the various state agencies are met.[423]

7. Enforcement of the federal and state governments' trust responsibilities to Native Hawaiians should be enhanced.

The federal government's unwillingness to enforce trust responsibilities under the State of Hawai'i Admission Act suggests the need to enact legislation to allow for the enforcement of the Ceded Lands Trust and Hawaiian Home Lands Trust in federal court, including a right of action and a waiver of sovereign immunity.[424] Considering the fact that "[t]he Native Hawaiian people are the only native people who have never been given the right to bring their claims against the United States to any independent body,"[425] the U.S. government apparently remains free to ignore its trust obligations to Native Hawaiians—not to mention the recommendations contained in this Advisory Committee's two previous reports—without any true accountability.[426] The absence of such relief has not been adequately explained in light of historical procedures implemented to allow Native Americans and Native Alaskans to air their claims and seek justice. The Hawaii Advisory Committee concludes that the historical exclusion of Native Hawaiians' claims against the government is a major contributing factor to the adverse conditions they now face.

Claims by Native Hawaiians concerning breaches of trust committed by federal officials in charge of administering the Hawaiian Home Lands Trust prior to statehood, for example, need to be identified, investigated, and redressed where appropriate. The failure of state and federal agencies to pay compensation for their use of, or for allowing private use of, the ceded lands also needs to be addressed. While these trusts are still being administered by the State of Hawai'i, there should at the very least be designated a representative in the Department of Justice with direct responsibility for enforcement of these trust responsibilities. Such representative must hold at least annual meetings with Native Hawaiian organizations and individuals, in Hawai'i, to update them on progress relating to investigations of reported problems. These reports ought to include the status of any discussions, negotiations, arbitrations, or litigation commenced to resolve outstanding issues.

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[422] Hawaii Advisory Committee, *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, 1991, p. 44 (Recommendation 3: Return of Federal Lands; Adequate Compensation; Amend Quiet Title Act); ibid., p. 45 (Recommendation 6: Federal Support for Completing Land Inventory).

[423] Ibid., p. 43 (Recommendation 1: Congressional Action; Office of Compliance and Trust Counsel).

[424] Ibid., p. 45 (Recommendation 4: Right to Sue; Legal Resources).

[425] Jon M. Van Dyke statement, Forum 1998 Transcript, vol. 1, p. 158.

[426] Christensen statement, Forum 1998 Transcript, vol. 1, p. 70 (observing that "[s]ince statehood, the state has managed the public lands in a way that suggests that the state is more willing to subsidize whatever special interest seems desirable at the time, by charging very low rents for the use of public lands for private purposes"). *See also* DeSoto statement, Forum 1998 Transcript, vol. 2, pp. 176–78 (discussing state efforts to diminish Hawaiian entitlements, including placing a cap on OHA's share of ceded lands revenues).

8. State and federal funding should be increased.

The Advisory Committee concludes that the betterment of conditions for Native Hawaiians will ultimately improve the conditions of all residents of the state of Hawai'i. Therefore, state and federal funding should be allocated for the establishment of additional social and economic programs to assist the Native Hawaiian community—not only with improving their economic situation, but also with perpetuating the Hawaiian culture and furthering understanding about Hawaiian needs. Possible areas for additional funding include higher education, the establishment of Hawaiian cultural centers and language immersion programs, medical services, job training programs, and housing programs.[427] The expenditures of federal and state dollars for a variety of educational, health, employment training, and other social services are justified both in recognition of the disproportionate needs of Hawaiians in these areas, and as a remedy (for the loss of their nationhood) that is distinct from traditional civil rights remedies.[428]

9. Context-sensitive planning should be required with respect to all governmental, judicial, or legislative actions affecting Native Hawaiians.

The Advisory Committee believes that the cultural, political, historical, and economic context within which Native Hawaiians are situated must be taken into consideration when developing programs to serve the Native Hawaiian community. This is also true with respect to the rendering of judicial orders and the development of state and federal legislation governing Native Hawaiian issues. Accordingly, the Hawaii Advisory Committee urges further that eligibility for such programs be based upon Native Hawaiian traditions regarding cultural identity (e.g., the Kumulipo), which more accurately reflect group membership than any blood quantum requirement.[429]

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[427] Hawaii Advisory Committee, *A Broken Trust*, p. 45 (Recommendation 5: Federal Funding and Technical Support); ibid., p. 46 (Recommendation: State Funding).

[428] Hoshijo statement, Forum 2000 Transcript, p. 89. *See also* Chris Iijima, "Race Over Rice: Binary Analytical Boxes and a 21st Century Endorsement of 19th Century Imperialism in *Rice v. Cayetano*," *Rutgers Law Review*, vol. 53 (2001) (forthcoming) ("standard civil rights and equal protection doctrines do not apply to circumstances involving the remedy for the displacement of a sovereign people from their homeland").

[429] *See* footnotes 9–17, 310–11 and accompanying text above. J. Kehaulani Kauanui, "Rehabilitating the Native: Hawaiian Blood Quantum and the Politics of Race, Citizenship, and Entitlement," 2000 (unpublished Ph.D. dissertation, University of California at Santa Cruz). Alani Apio, "Kanaka Lament: Once proud nation, Hawaiians today are defined as just a race," *The Honolulu Advertiser*, Mar. 25, 2001, pp. B1, B4.

Appendix

2000 Forum Panelists

Panel 1: Impact on Programs in Health, Education, Housing

Dr. Richard Kekuni Akana Blaisdell, Professor of Medicine, University of Hawai'i at Mānoa
Dr. Peter Hanohano, Executive Director, Native Hawaiian Education Council
Dr. Lilikalā Kame'eleihiwa, Director, Center for Hawaiian Studies, University of Hawai'i at Mānoa
Tara Lulani McKenzie, President and Chief Executive Officer, Alu Like, Inc.
Dr. Kenneth Conklin, Retired University Professor and Former High School Mathematics Teacher

Panel 2: Legal Implications

Mahealani Kamau'u, Executive Director, Native Hawaiian Legal Corporation
Bill Hoshijo, Executive Director, Hawai'i Civil Rights Commission
Robert Klein, Attorney and former State Supreme Court Justice
H. William Burgess, Retired Attorney
Edward King, Adjunct Professor of Law, University of Hawai'i at Mānoa, and former Chief Justice for the Federated States of Micronesia

Panel 3: Government Programs

Clayton Hee, Chairman, Board of Trustees, Office of Hawaiian Affairs
Sherri Broder, Legal Counsel, Office of Hawaiian Affairs
Ray Soon, Chairman, Hawaiian Homes Commission, and Director of the State Department of Hawaiian Home Lands

Panel 4: Legislative Response

Mike Kitamura, Office of U.S. Senator Daniel Akaka
Sol Kaho'ohalahala, Representative, Hawai'i State Legislature
Jon Van Dyke, Professor of Law, University of Hawai'i at Mānoa

Panel 5: Perspectives

Sondra Field-Grace, Secretary and Treasurer, Ili Noho Kai O Anahola
David K. Helela, Retired Army Officer
Kanoelani Medeiros, Self-Proclaimed Hawai'i Nationalist
Patrick Hanifin, Attorney

1998 Forum Panelists

Panel 1: Public Law 103-150, Purpose and Meanings (Overview)

Esther Kia'aina, Legislative Assistant, Office of U.S. Senator Daniel Akaka
Rev. Kaleo Patterson, Associate Pastor, Kaumakapili Church, and Executive Director, Hawaii Ecumenical Coalition
James Mee, Attorney

Panel 2: Civil Rights Implications of Public Law 103-150

Carl Christensen, Staff Attorney, Native Hawaiian Legal Corporation
Pōkā Laenui, Executive Director, Institute for the Advancement of Hawaiian Affairs
John Goemans, Attorney
Kanalu Young, Professor, Center for Hawaiian Studies, University of Hawai'i at Mānoa

Panel 3: Equal Protection for Native Hawaiians
Jon Van Dyke, Professor of Law, University of Hawai'i at Mānoa
Stuart Minor Benjamin, Professor of Law, University of San Diego
Mililani Trask, Kia'āina (Governor), Ka Lāhui Hawai'i

Panel 4: State Reconciliation Efforts and Future Initiatives
A. Frenchy DeSoto, Chairperson, Office of Hawaiian Affairs
Kali Watson, Chairman, Hawaiian Homes Commission, and Director, Department of Hawaiian Home Lands
Peter Apo, Special Assistant for Hawaiian Affairs, Office of the Governor

Panel 5: Federal Oversight, Reconciliation Efforts, and Future Initiatives
Ferdinand "Danny" Aranza, Deputy Director, Office of Insular Affairs, U.S. Department of the Interior
Esther Kia'aina, Legislative Assistant, Office of U.S. Senator Daniel Akaka
Mark Van Norman, Deputy Director, Office of Tribal Justice, U.S. Department of Justice
Grover Joseph Rees, Staff Director and Chief Counsel, Subcommittee on International Operations and Human Rights, Committee on International Relations, U.S. House of Representatives

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NOTE: The Hawaii Advisory Committee requested inclusion of the transcripts from the 1998 and 2000 community forums, in addition to all written submissions, as appendices to this report. Consistent with Commission practices, these documents, although not appended, are on file with the Western Regional Office.

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